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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE COURT OF APPEALS
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JURISDICTIONAL STATEMENT

Appellant, Consolidated Edison Company of New York, Inc. ("Con Edison"), appeals from the final judgment of the Court of Appeals of the State of New York, entered on May 1, 1979, holding that an order of appellee, the Public Service Commission of the State of New York ("the Commission"), is not violative of appellant's right of free speech guaranteed by the First Amendment to the United States Constitution as applied to the states by the Fourteenth Amendment. That order deprives all utilities subject to the Commission's jurisdiction in New York State, including appellant, of the principal means of communicating with their customers by prohibiting such utilities from using bill inserts (messages included with bills mailed to customers) to communicate their views on "controversial matters of public policy."

The asserted justification relied on by the court below for this ban is the perceived need to protect the privacy rights of utility customers. The court speculated that receipt in the mail of a message stating the utility's view on a controversial matter of public policy might "offend the sensibilities" of some of the utility's customers (Appendix A, p. 10a). It then approved the Commission's ban on the ground that "Government need not stand idly by and deny assistance to those who are inflamed by having a particular view foisted upon them." *Id.* However, under the regime of censorship approved by the court below, it is the State, rather than the individual customer, that determines what messages would offend the customer's sensibilities. Thus, in "protecting" customers from receiving materials the State assumes customers would find objectionable, the State will be preventing many customers from receiving materials even though they may wish to receive them.

Con Edison submits this jurisdictional statement to show that the Supreme Court has jurisdiction and that this appeal presents substantial questions.

Opinions Below

The opinion of the Court of Appeals of the State of New York is reported at 47 N.Y.2d 94, 390 N.E.2d 794, 417 N.Y.S.2d 30 (1979), and is set forth in Appendix A hereto (pp. 1a-15a). The opinion of the New York Supreme Court, Appellate Division, Third Judicial Department, is reported at 63 A.D.2d 364, 407 N.Y.S.2d 735 (1978), and is set forth in Appendix B hereto (pp. 16a-23a). The opinion of the New York Supreme Court, Albany County, is reported at 93 Misc. 2d 313, 402 N.Y.S.2d 551 (1978), and is set forth in Appendix C hereto (pp. 24a-28a). The opinion of the Commission is reported at 17 NY PSC 1-R

(1977), and is set forth in Appendix E hereto (pp. 31a-56a). The order of the Commission on rehearing is reported at 17 NY PSC 17-R (1977), and is set forth in Appendix G hereto (pp. 59a-71a).[1]

Jurisdiction

Appellant Con Edison instituted in the courts of New York a special proceeding pursuant to Article 78 of the Civil Practice Law and Rules and actions for declaratory judgment and injunction to annul, vacate and set aside the Commission's order, to declare the order violative of the First and Fourteenth Amendments to the United States Constitution, and to permanently enjoin its enforcement (R19-131).[2] By judgment entered on March 6, 1978 (R7-11), Special Term of the Supreme Court, Albany County, granted the relief requested (R7-11). By order dated August 2, 1978, the Appellate Division reversed that judgment and declared the Commission's order constitutional (R810-11). The Court of Appeals affirmed the order of the Appellate Division.

The Court of Appeals final judgment was entered on May 1, 1979, and is set forth in Appendix D hereto (pp. 29a-30a). A notice of appeal to this Court was timely filed with the clerk of the Supreme Court, Albany County, on

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[1] The Court of Appeals and the Appellate Division each dealt in a single opinion with the bill insert ban and with other restrictions on utility advertising imposed by the Commission. Review of these other restrictions in the courts below was obtained by Central Hudson Gas & Electric Corporation, another utility subject to the jurisdiction of the Commission. Con Edison's challenge in this Court and the courts below involves only the validity of the bill insert ban.

[2] References to the Record on Appeal in the court below are cited "R —".

June 26, 1979, and is set forth in Appendix H hereto (pp. 72a-74a). This appeal is being docketed in this Court within 90 days from entry of final judgment in the court below.

Jurisdiction to hear this appeal is conferred on this Court by 28 U.S.C. §1257(2). *Corn Products Refining Co.* v. *Eddy,* 249 U.S. 427 (1919).

Statutes Involved

The February 25, 1977, order of the Commission, the validity of which is involved on this appeal, is not reported and is set forth in Appendix F hereto (pp. 57a-58a). In relevant part this order provides that:

> All utilities subject to the jurisdiction of this Commission shall discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy.

The Court of Appeals determined that the Commission had statutory authority to regulate the content of billing envelopes (Appendix A, pp. 6a-8a). The provisions of the New York Public Service Law (§2, subds. 10, 12; §4, subd. 1; §66, subds. 1, 12-a) which were held to give the Commission statutory authority to issue the above order appear at the end of this jurisdictional statement at pp. 1s-3s.

Questions Presented

1. Whether the order of the Public Service Commission, insofar as it prohibits utilities from communicating their views to their customers on "controversial matters of public policy" by means of bill inserts, is invalid as a denial of freedom of speech.

2. Whether the words "controversial matters of public policy" as used in the Commission's order are so vague as to deprive appellant of its liberty or property without due process of law in violation of the Fourteenth Amendment.

Statement of the Case

The utility industry performs a vital role in meeting our Nation's energy requirements. It presently confronts several issues which have an important bearing on its ability to carry out this function. Examples of such issues, which are likely to have a significant impact upon utilities and consumers alike, are the use of coal for fuel for power plants to decrease dependency on expensive foreign oil imports, the replacement of investor-owned utility service by government-owned facilities, the use of nuclear power to provide the future needs for electric energy, the need for development of new sources of natural gas, the effect of environmental costs on utility rates, and other similar matters. As can be seen, all of these issues are the subjects of national public debate and it is essential to our democratic process that the free flow of information and ideas on these issues remain unfettered if the public is to be fully informed.

Appellant Con Edison provides electric, gas and steam service to more than three and a half million customers in the New York City area.[3] Bill inserts are the primary means by which Con Edison communicates its views to its customers on public issues which are important to them as consumers of utility services.[4] The uncontradicted evidence submitted by Con Edison in this case shows that it

[3] *Con Edison, Annual Report, 1978* at inside cover and 38.

[4] Con Edison also uses bill inserts to convey notices required by the Commission's regulations or by law to be sent to its customers,

lacks ample alternative channels for the communication of this information, because other means of communication involve more cost, are less likely to reach Con Edison's customers, and may be less effective (R112-15).

Despite the importance of bill inserts as a means of communication, on February 25, 1977, the Commission announced a policy banning the use of bill inserts by utility companies for the purpose of communicating their opinions or viewpoints on "controversial issues of public policy" (Appendix E, p. 43a). The Commission characterized utility customers as a captive audience and reasoned that "it is basically unfair to subject ratepayers who disagree with the utility's viewpoint to the arguments of the utility through its billing mechanism." *Id.* Bill inserts should be confined, the Commission concluded, to conveying "non-controversial and useful information." *Id.* The Commission implemented its ban on the use of bill inserts by the order involved on this appeal.[5]

Con Edison, several other utilities and the Consumer Protection Board petitioned for rehearing of the Commission's order (R62-104, 677-794). In its petition for rehearing Con Edison claimed that the Commission's order violated its freedom of expression secured to it by the First and Fourteenth Amendments to the United States Constitution and that the order was void for vagueness (R63-

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and to communicate information on such topics as new rates, energy conservation, customer service procedures, and safety in the use of the Company's services.

[5] Anyone who knowingly fails or neglects to obey or comply with an order of the Commission may be punished by a fine not to exceed $1,000 for each violation. Every distinct violation of any order shall be a separate and distinct offense, and in case of a continuing violation each day shall be deemed a separate and distinct offense. N.Y. Pub. Serv. Law §§73, 86 (McKinney 1955).

77). By order issued July 14, 1977, the Commission rejected these constitutional claims and denied the various petitions for rehearing (Appendix G, pp. 64a-68a).

On November 7, 1977, Con Edison commenced an Article 78 proceeding and actions in Supreme Court, Albany County, to annul, vacate and set aside the Commission's order, to declare the order unconstitutional, and to permanently enjoin its enforcement (R19-131). Con Edison's Petition and Complaint included the allegation that by prohibiting Con Edison from using bill inserts to communicate its views on controversial matters to its customers, the Commission's order violated its freedom of expression under the First and Fourteenth Amendments to the United States Constitution (R27). Con Edison also alleged that the Commission's order was void for vagueness under the Fourteenth Amendment to the United States Constitution (R27-28).

Special Term of the Supreme Court held that the bill insert ban constituted a restriction on speech which was not justified by a compelling state interest. It rejected the Commission's argument that the use of bill inserts represents a subsidized means of presenting the utility's views, since it was conceded by the Commission that the cost of mailing would be the same whether or not the inserts were included with the bills, and the Commission may allocate any increased costs to the proper account (Appendix C, pp. 26a-27a). Special Term also rejected the Commission's captive audience argument, finding that the mailbox is not a constitutionally protected enclave (Appendix C, p. 27a). Special Term also found that alternate channels of communication involve more cost, are less likely to reach subscribers and may be less effective. *Id.* Finally, Special Term concluded that the Commission's order was unconstitutionally vague (Appendix C, pp. 27a-28a).

Upon the Commission's appeal, the Appellate Division, Third Department, reversed the judgment of Special Term and declared the Commission's order to be constitutional. The majority of the Appellate Division noted that the cost of mailing out bill inserts stating the utility management's views on controversial matters of public policy should not be charged to utility customers, but should be borne by the utility's shareholders. It then concluded, without any evidence or explanation, that it would be impossible for the Commission to separate out the costs attributable to mailing out bills (an expense chargeable to customers) from the costs attributable to mailing out management statements included in the billing envelopes (an expense chargeable to utility shareholders) (Appendix B, p. 18a). Ignoring the uncontradicted evidence that the Commission's ban did not leave Con Edison ample alternative channels for the communication of its views on controversial matters of public policy, the majority concluded that because the Commission's order did not ban Con Edison from using the "usual forms of advertisement," it constituted an "insignificant impingement" on Con Edison's constitutional rights, which it felt was far outweighed by the State's interest in preventing customer subsidy of "management's pamphleteering" (Appendix B, p. 19a). Finally, the majority concluded that the Commission's order was not unconstitutionally vague. *Id.* The minority of the Appellate Division found nothing to prohibit the Commission from "proportioning the costs so that the costs attributable to the placing of the bill inserts in envelopes and the mailing of bill inserts would be chargeable to shareholders rather than ratepayers" (Appendix B, p. 23a). Such an apportionment, the minority concluded, would prevent the subsidizing of management's views through the use of bill inserts. *Id.*

In affirming the order of the Appellate Division, the Court of Appeals recognized that government regulation

designed to suppress traditional communicative activity because of its content or potential impact is subject to the most rigorous scrutiny (Appendix A, p. 8a). The Court of Appeals avoided this strict scrutiny, however, by concluding that the Commission's ban is not a content-based regulation, despite the fact that it is defined solely by reference to the content of the message. The court below then examined the Commission's order to determine if it could qualify as a valid time, place and manner regulation. It concluded that the bill insert ban was a valid time, place and manner restriction, because it viewed the order as content neutral, as supported by a significant governmental interest (the protection of the privacy rights of utility customers), and as leaving open alternative channels of expression (Appendix A, pp. 9a-11a). The court below rejected the vagueness argument properly raised by Con Edison in its notice of appeal (R805-06) and in its brief (pp. 28-30) to that court without addressing the issue in its opinion. *See Street* v. *New York,* 394 U.S. 576, 581-85 (1969); R. Stern and E. Gressman, *Supreme Court Practice* §3.27, at 214-15 (5th ed. 1978).

The Questions Presented Are Substantial

The constitutional questions presented in this case affect the several hundred public utilities regulated by the Commission in New York State, and will likely affect numerous other utilities in other states.[6] The fundamental First

[6] A bill insert ban similar to the one adopted by the New York Commission is now in effect in California, Cal. Pub. Util. Code §453(d) (West Supp. 1979). Similar bans were considered and rejected by utility regulatory commissions in Iowa and Maine as violative of the First Amendment. *Citizens United for Responsible Energy* v. *Iowa Power and Light Co.,* Docket No. C-5-185 (Iowa State Commerce Comm'n, orders dated Oct. 10 and 31, 1975); *In Re Petition of Committee for Cheaper Electrical Rates,* F. C. #2026 (Maine P.U.C. Oct. 16, 1973). Dismissal of this appeal may

Amendment rights of these corporations to freely express their views on vital issues of the day, and the fundamental First Amendment rights of their customers to hear the views which these corporations wish to express,[7] are affected by the decision below. In addition, this case raises questions about several fundamental First Amendment principles of general application.

It is to be emphasized that utility customers' rates will not be increased by reversal of the judgment of the court below. This case does not involve any questions about a utility regulatory commission's traditional ratemaking functions, or the question of who is to pay for communicative activities of utilities,[8] but involves rather the question of the constitutional validity of a state commission's attempt to impose an absolute prohibition on the communication of messages on public issues by utilities to their customers by means of bill inserts.

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result in reconsideration of these decisions. Decision in this case may also influence the outcome of a proceeding recently instituted by the North Carolina Utilities Commssion to consider "what types of inserts may be reasonably and appropriately included with utility bills." *In Re Investigation and Rulemaking Relating to What May Be Included As a Utility Bill Insert,* Docket No. M-100, Sub 80 (Nov. 10, 1978).

[7] The First Amendment protects not only the right to send, but also the right to receive, information. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 756-57 (1976).

[8] In its opinion (Appendix E, pp. 41a-43a), the Commission reiterated its view that the cost of "political" advertising must be borne by the utility's shareholders. Con Edison has not challenged this determination.

Nor does this case involve any questions about what right the State has, if any, to regulate false or misleading messages, when the messages are at the core of the First Amendment.

POINT I

The Court Below Erred in Holding That the Commission's Ban on the Use of Bill Inserts by Utility Corporations for the Expression of Their Views on "Controversial Matters of Public Policy" Is a Valid Restriction on the Constitutionally Protected Rights of Such Corporations to Freedom of Speech and Freedom of the Press.

A. *Introduction.*

Mr. Justice Marshall captured the essence of the First Amendment when he wrote that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago* v. *Mosley,* 408 U.S. 92, 95 (1972). It is undisputed that the speech to which the Commission's ban applies is at the core of the First Amendment. This Court recently reaffirmed the principle that discussion of public issues "is at the heart of the First Amendment's protection." *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 776 (1978). Continuing, the Court observed that " 'there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.' " *Id.* at 776-77. It is clear that the speech in question does not lose the First Amendment's protection because its source is a corporation. *Id.* at 777.

Speech that is controversial is protected by the First Amendment. In reversing a conviction for uttering words contemptuous of the American flag, Mr. Justice Harlan wrote for the Court in *Street* v. *New York,* 394 U.S. at 592, that "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely

because the ideas are themselves offensive to some of their hearers." More recently, Mr. Justice Stevens reiterated this view in *FCC* v. *Pacifica Foundation,* 438 U.S. 726, 745 (1978): "the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." [9]

Nor is the result changed on account of the means (bill inserts) chosen by Con Edison to communicate its ideas. This Court has expressly held that "The liberty of the press is not confined to newspapers and periodicals. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell* v. *Griffin,* 303 U.S. 444, 452 (1938). And freedom of speech and the press extend not only to the content of communications, but embrace the right of distribution: "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Ex parte Jackson,* 96 U.S. 727, 733 (1878). *See also Lovell* v. *Griffin,* 303 U.S. at 452.

As the court below recognized, analysis in the First Amendment area proceeds on one of two tiers, depending on the nature of the restriction which government has imposed (Appendix A, p. 8a). At one level, government regulation designed to suppress traditional communicative activity because of its content or potential impact is sub-

[9] *See also Terminiello* v. *Chicago,* 337 U.S. 1, 4 (1949):

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

ject to the most rigorous scrutiny. Absent some compelling justification, content-oriented restrictions may not stand. *Id.* And the burden is on the government to show the existence of a compelling state interest. As expressed by Mr. Justice Brennan in *Elrod* v. *Burns,* 427 U.S. 347 (1976):

> It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny. . . . Thus encroachment "cannot be justified upon a mere showing of a legitimate state interest." The interest advanced must be paramount, one of vital importance, and the burden is on the Government to show the existence of such an interest.

Id. at 362 (citations omitted). *See also First National Bank of Boston* v. *Bellotti,* 435 U.S. at 786.

There is also the principle, not recognized by the court below, that even if the government sustains the burden of proving that a restriction of freedom of expression is required to effectuate a compelling governmental interest of paramount importance, the State must employ means "closely drawn to avoid unnecessary abridgment" of protected expression. *Buckley* v. *Valeo,* 424 U.S. 1, 25 (1976).

On the second tier of First Amendment analysis are those governmental measures, such as time, place and manner regulations, which, although not directly aimed at communication, inhibit the free flow of information and ideas (Appendix A, p. 8a). To constitute a valid time, place and manner restriction, a regulation must be justified without reference to the content of the regulated speech; it must serve a significant governmental interest; and it must leave open ample alternative channels for communication of the information. *Virginia State Board of Pharmacy,* 425 U.S. at 771.

The Court of Appeals concluded that the Commission's bill insert ban was not a content-based restriction and that this ban met all requirements to constitute a valid time, place and manner regulation. Both of these conclusions are in error.

B. *The Court Below Erred in Holding That the Commission's Bill Insert Ban Is Not a Content-Based Regulation.*

Professor Ely has suggested the following question for determining whether or not a regulation is content based:

> The critical question would therefore seem to be whether the harm that the state is seeking to avert is one that grows out of the fact that the defendant is communicating, and more particularly out of the way people can be expected to react to this message, or rather would arise even if the defendant's conduct had no communicative significance whatever.

Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis,* 88 Harv. L. Rev. 1482, 1497 (1975) (footnote omitted). *See also* L. Tribe, *American Constitutional Law* §§12-2, 12-3 (1978).

The distinction between content-based regulations and time, place and manner regulations may be clearly seen by comparing two of this Court's decisions. *Police Department of Chicago* v. *Mosley,* 408 U.S. 92 (1972), is illustrative of content-based regulations. That case involved the validity of a Chicago ordinance prohibiting picketing within 150 feet of a school during school hours, but excepting "peaceful picketing of any school involved in a labor dispute." In writing for the Court, Mr. Justice Marshall observed that:

> The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign.
>
> . . . .
>
> In this case, the ordinance itself describes impermissible picketing not in terms of time, place, and manner, but in terms of subject matter. The regulation "thus slip[s] from the neutrality of time, place, and circumstance into a concern about content."

Id. at 95-99 (footnote omitted).[10] Because the government discriminated among pickets in terms of their messages, the ordinance was held to be unconstitutional.

Kovacs v. *Cooper,* 336 U.S. 77 (1949), is illustrative of time, place and manner regulations. In that case, this Court upheld municipal regulation of sound trucks. In commenting on this decision, Professor Ely observed that "the values the state seeks to promote by such regulation, values of quiet and repose, would be threatened as much by meaningless moans and static (which is usually how it comes out anyway) as by a political message." Ely, *supra,* at 1499.

The ban approved by the court below is a classic example of a content-based restriction. The ban is determined solely by reference to the content of the message. Controversial messages are prohibited, whereas "noncontroversial and useful" messages are permitted (Appendix E, p. 43a). As in *Police Department of Chicago,* 408 U.S. at 95, "[t]he

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[10] The fact that the Commission's ban applies only to one mode of communication, a fact the court below appeared to consider important to its holding (Appendix A, p. 9a), does not transform this ban into a time, place, or manner regulation. *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. 85, 94 (1977).

operative distinction is the message." Moreover, the court below could not justify the bill insert ban by reference to "an important or substantial governmental interest [that] is unrelated to the suppression of free expression," *United States* v. *O'Brien,* 391 U.S. 367, 377 (1968), as the harm on which it relied in upholding the ban flowed entirely from the communicative content of the bill inserts.[11] The bill insert ban must thus be categorized as a content-based restriction. *See* Ely, *supra,* at 1498.

The court below reached a contrary result by concluding that the bill insert ban "does not discriminate against persons of any particular political stripe or prohibit the expression of any one position on a hotly debated issue" (Appendix A, p. 11a), and that it is applied "in an objective and evenhanded manner." *Id.* What the court is suggesting is that so long as the speech of both parties to a debate is equally suppressed, there is no violation of the First Amendment. Under this approach, the State may suppress debate on all public issues, so long as the prohibition is applied in an "evenhanded manner." The court below relied on *Greer* v. *Spock,* 424 U.S. 828 (1976), and *Lehman* v. *City of Shaker Heights,* 418 U.S. 298 (1974), to reach the conclusion that the Commission's ban is not content oriented (Appendix A, p. 11a). In these cases the Court approved restrictions based on subject matter, but there was no discrimination among viewpoints within subject matter. Although there are important differences between the restrictions involved in these cases and the Commission's ban,[12] the court below took no note of the differences and

[11] The court below feared that a bill insert stating a utility's position on a controversial matter might "offend the sensibilities" of the utility's customers (Appendix A, p. 10a).

[12] In *Greer* and *Lehman,* speakers attempted to obtain forced access to use the government's property for their purposes, whereas in this case the government is seeking to prevent the use by the utility of its own property for First Amendment purposes. It has been suggested that *Greer* "stands for the proposition that the government may regulate speech on its own property in ways which it could not do if the regulated speech were on private property." Rehnquist, *The First Amendment: Freedom, Philosophy, and the Law,* 12 Gonz. L. Rev. 1, 11 (1976). Moreover, these decisions have been widely discussed by commentators as being unduly restrictive of the freedom of expression. Tribe, *supra,* §12-21, at 692-93; Karst, *Equality as a Central Principle in the First Amendment,* 43 U. Chi. L. Rev. 20, at 34, 36 (1975); Schiro, *Commercial Speech: The Demise of a Chimera,* 1976 Sup. Ct. Rev. 45, 71-77; Stone, *Fora Americana: Speech in Public Places,* 1974 Sup. Ct. Rev. 233, 270-71, 275-80; *The Supreme Court, 1975 Term,* 90 Harv. L. Rev. 1, 152-59 (1976); *The Supreme Court, 1973 Term,* 88 Harv. L. Rev. 13, 149-56 (1974); 13 Duquesne L. Rev. 1003 (1975).

disregarded other decisions in which this Court invalidated restrictions based on subject matter, *Police Department of Chicago* v. *Mosley, supra; Erzoznik* v. *City of Jacksonville,* 422 U.S. 205 (1975). To the extent that *Greer* and *Lehman* have any application to this case, it is of vital importance to the clarification of First Amendment rights that this Court utilize this appeal to reconcile these conflicting decisions on the treatment of subject-matter restrictions.[13]

[13] Professor Stone recently examined this Court's decisions involving subject-matter restrictions and concluded that:

> The Supreme Court has failed to recognize subject-matter restrictions as a separate class of restraints on speech. As a consequence, the Court has in some cases treated the subject-matter restriction as if it were indistinguishable from other sorts of content-based restrictions, while in others it has effectively disregarded the subject-matter restriction entirely and thus analyzed the challenged legislation or regulation as if it were content-neutral. Moreover, apart from a few rather obvious and seemingly casual observations, the Court has made little effort to place the problem in its proper first amendment context or to analyze it in any real depth.
>
> Although the differences between content-based and content-neutral restrictions are more elusive than might be expected, and are often only differences of degree, such differences do exist, and the Court's exacting scrutiny of content-based restrictions can be explained and justified. Subject-matter re-

There remains the question whether the court below properly concluded that the Commission's ban is viewpoint neutral (Appendix A, p. 11a), for it is undisputed that if the Commission discriminates among speakers on the basis of their viewpoints within a subject matter, its ban would be unconstitutional: "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *First National Bank of Boston* v. *Bellotti,* 435 U.S. at 784-85 (citing *Police Department of Chicago* v. *Mosley,* 408 U.S. at 96). *See also Greer* v. *Spock,* 424 U.S. at 838-39; *Young* v. *American Mini Theatres, Inc.,* 427 U.S. 50, 67 (1976).

Contrary to the Court of Appeals' conclusion, the Commission's ban does prohibit the expression of one position on hotly debated issues. By its terms the Commission's order provides that the use of bill inserts "as a mechanism for the dissemination of the *utility's position* on controversial matters of public policy" is prohibited (Appendix F, p. 58a; *see also* Appendix E, p. 43a) (emphasis added). Nor is the restriction applied by the state in an evenhanded manner, since the ban applies only to utilities and to no one else (Appendix F, p. 58a).

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strictions pose a particularly intriguing and useful puzzle, for they seem to exist in a middle world, sharing some characteristics with both of the more common forms of restrictions. It is largely for this reason that the Court has had so much difficulty in its efforts to come to grips with the subject-matter puzzle.

Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions,* 46 U. Chi. L. Rev. 81, 115 (1978).

C. *The Court Below Erred in Holding That the Commission's Ban Is a Valid Time, Place and Manner Regulation.*

Having determined that the Commission's ban is not a content-based regulation, the court below concluded that the ban furthers a significant governmental interest and does not foreclose alternative channels of expression, and thus constitutes a valid time, place and manner restriction (Appendix A, pp. 9a-11a). Even assuming the correctness of the Court of Appeals' conclusion that the Commission's ban is not a content-based regulation, its holding that this ban meets these other criteria to constitute a valid time, place and manner regulation is in error.

1. The Commission's Ban Does Not Further a Significant Governmental Interest.

a. *The Commission's Ban Does Not Accomplish Its Purpose.*

As we shall discuss below, this case raises the question whether the State has a valid interest, superior to the utility's freedom of expression guaranteed by the First Amendment, in protecting utility customers from receiving materials in the mail expressing a viewpoint with which they may disagree. Even assuming the presence of such a state interest, the bill insert ban approved by the Court of Appeals does not further that interest, and must be invalidated on this ground alone. *Smith* v. *Daily Mail Publishing Co.,* 47 U.S.L.W. 4824, 4826 (June 26, 1979).[14]

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[14] *Smith* involved the validity of a West Virginia statute which made it a crime for a newspaper to publish, without the written approval of the juvenile court, the name of any youth charged as a juvenile offender. The statute did not restrict the electronic media or any form of publication, except newspapers, from printing the names of youths charged in juvenile proceedings. The sole interest advanced by the State to justify this criminal statute

Furthermore, in the area of the First Amendment, "government may regulate . . . only with narrow specificity," *NAACP* v. *Button,* 371 U.S. 415, 433 (1963), and must act in a way so as to avoid unnecessary abridgement, *Buckley* v. *Valeo,* 424 U.S. at 25. The Commission's ban is both underinclusive and overinclusive. *See In Re Primus,* 436 U.S. 412, 432-33 (1978); *First National Bank of Boston* v. *Bellotti,* 435 U.S. at 792-95; *Erzoznik* v. *City of Jacksonville,* 422 U.S. at 213-15.

First, the restriction applies only to utilities. The State has not acted to "protect" utility customers from receiving "offensive" materials[15] of the nature here involved from any other source. There is no evidence in this record that would support the conclusion that people are more offended by receipt of unwanted mail from utilities than from other sources.[16]

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was to protect the anonymity of juvenile offenders. This Court invalidated the statute because even assuming that the statute served a state interest of the highest order, it did not accomplish its stated purpose. *Id.* at 4826. As Mr. Justice Rehnquist explained: "It is difficult to take very seriously West Virginia's asserted need to preserve the anonymity of its youthful offenders when it permits other, equally, if not more, effective means of mass communication to distribute this information without fear of punishment." *Id.* at 4827 (concurring opinion).

[15] The Court of Appeals merely *assumed* that customers would find the utility's views on public issues to be offensive (Appendix A, p. 10a). There is no basis for this assumption in the record except a complaint by a handful of Con Edison's more than three and a half million customers (R139-50).

[16] While utilities may have a monopoly in providing utility service, they have no monopoly in communicating by mail. The Privacy Protection Study Commission found that each week the U.S. Postal Service delivers 2.3 pieces of unsolicited direct mail to the average American household. *See Personal Privacy in an Information Society* 125 (1977) (hereinafter cited as *Privacy Commission Report*). Most, if not all, utility customers may easily be reached by mail by others. Most telephone utility customers'

Second, even utilities may mail "offensive" materials to their customers so long as the "offensive" message is not included in the billing envelope (Appendix A, pp. 9a-10a). Here again, there is no evidence in this record that would support the conclusion that utility customers are more offended by receipt of a message from their utility in the billing envelope than by receipt of the same message in a separate envelope.[17]

Third, the ban applies only to messages stating the "utility's position on controversial matters of public policy" (Appendix F, p. 58a). Once again, there is no evidence in this record that would support the conclusion that utility customers are more offended by messages on public issues than by other messages.[18] Many customers would undoubtedly prefer to receive information about the operation of nuclear power plants or the effect on their rates of the installation of multi-million dollar cooling towers at electric generating plants, than tips about the use of hair dryers. The State's interest in protecting utility customers from exposure to offensive materials is not advanced when it is the State, rather than the individual customer,

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addresses can be obtained simply by using the telephone directory. The addresses of most customers of other types of utilities can be obtained from telephone directories or from one or more of the many readily available mailing lists. It has been estimated that there are 25,000 mailing lists in existence, Ballard, *Privacy and Direct Mail Advertising,* 47 Fordham L. Rev. 495, 497 (1979). Some mailing lists contain as many as 60 million American households, *Privacy Commission Report, supra,* at 128.

[17] The only certain conclusion one can reach about these two kinds of mailings is that the latter is significantly more expensive (R112-13).

[18] For many customers, the contrary is true: "In the eyes of many passengers, certain commercial or public service messages are as profoundly disturbing as some political advertisements might be to other passengers." *Lehman* v. *City of Shaker Heights,* 418 U.S. at 319 (Brennan, J., dissenting opinion) (footnote omitted).

that determines what messages would offend the customer's sensibilities.[19] Moreover, the approach followed by the Court of Appeals is in fundamental conflict with this Court's holdings that the State may not make the decision for its citizens as to what materials to read. *Rowan* v. *United States Post Office Department,* 397 U.S. 728 (1970), makes clear that the decision as to whether a given communication is to be received is a judgment for each person to make, not one for the State to impose upon the entire community. In *Rowan,* the Court upheld a statute, 39 U.S.C. §4009, 39 U.S.C.A. app. §4009 (West Supp. 1979) (current version at 39 U.S.C.A. §3008 (West Supp. 1979)), permitting householders to require that mail advertisers stop sending them lewd or offensive materials and remove their names from mailing lists. Unlike the situation here, householders who wished to receive the sender's communications in *Rowan* were not prevented from doing so. Equally important, the determination of offensiveness under the statute involved in *Rowan* was completely within the discretion of the individual householder; no governmental evaluation of the mail's content stood between the mailer and the householder. *See FCC* v. *Pacifica Foundation,* 438 U.S. at 766 (Brennan, J., dissenting opinion). This Court's distaste for governmental intrusion into the channels of communication is reflected in many of its decisions. In *Cohen* v. *California,* 403 U.S. 15, 25 (1971), Mr. Justice Harlan wrote that "[i]ndeed, we think it is largely because governmental officials cannot make principled distinctions in

[19] When the State imposes an absolute ban on mailing certain messages to all of a utility's customers by means of bill inserts, the ban, of necessity, is overly broad, because it impedes delivery of the message even to willing addressees. However, "[i]n the area of First Amendment freedoms, government has the duty to confine itself to the least intrusive regulations which are adequate for the purpose." *Lamont* v. *Postmaster General,* 381 U.S. 301, 310 (1965) (Brennan, J., concurring opinion). *See also United States* v. *O'Brien,* 391 U.S. at 377.

this area [between offensive and non-offensive words] that the Constitution leaves matters of taste and style so largely to the individual." In *Martin* v. *Struthers,* 319 U.S. 141 (1943), the Court invalidated an ordinance banning door-to-door distribution of literature to protect the privacy of householders, because the ordinance substituted the judgment of the community for the judgment of the individual householder. The Court noted that the ordinance subjected the distributor to punishment for annoying the person on whom he calls, "even though the recipient of the literature distributed is in fact glad to receive it." *Id.* at 144.

b. *The State's Interest in Protecting the Privacy of the Home From Unwanted Communications Is Not Sufficient to Justify the Prohibition on the Mailing of Messages at the Core of the First Amendment.*

Should this Court conclude that the Commission's ban accomplishes its purpose, this case would present a conflict between the First Amendment rights of entities to disseminate their views by means of bill inserts sent through the mail and the privacy rights at home of unwilling recipients, when the messages to be sent are at the core of the First Amendment. This Court has never considered this question.[20] It is an important and recurring question which we believe warrants plenary consideration by this Court.

[20] *Rowan* v. *United States Post Office Department* is the closest in its facts to this case. However, that case involved a statute (39 U.S.C. §4009) dealing with the mailing of any "pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative." Commentators have suggested that *Rowan* is no authority for restricting the mailing of noncommercial, core First Amendment materials, the kinds of materials involved in this case. *The Supreme Court, 1969 Term,* 84 Harv. L. Rev. 1, 125 (1970); 22 Baylor L. Rev. 442, 449 (1970).

The Court of Appeals erred grievously in concluding that several of this Court's decisions support the result it reached in this case (Appendix A, p. 10a). The court below misconstrued all of these decisions, for none of them supports its conclusion. *Rowan* and *Martin* v. *Struthers* make clear that the decision as to whether a given communication is to be received at home is a judgment for each person to make, not one for the State to impose, as the Commission did here, upon the entire community. *Kovacs* v. *Cooper* involved an ordinance prohibiting the operation of sound trucks emitting "loud and raucous noises" on the street, and unlike this case, there was no attempt to regulate the content of the communications. *Cohen* v. *California* involved a conflict between the First Amendment rights of speakers and the privacy rights of unwilling viewers outside the home. In holding that the First Amendment rights of speakers prevailed in that context, the Court wrote that:

> The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

403 U.S. at 21. Finally, the Court of Appeals relied on *Lehman* v. *City of Shaker Heights,* the "captive audience" case, in approving the Commission's bill insert ban. The "captive audience" doctrine means that one may not hold an unwilling viewer or listener captive and coerce him or her to read or listen to the speaker's message. Mr. Justice Douglas, who first gave this doctrine judicial recognition, noted that coercion is a necessary element of the doctrine:

> The present case involves a form of coercion to make people listen. . . . [T]he man on the streetcar has no choice but to sit and listen [to radio programs], or perhaps to sit and to try *not* to listen.

Public Utilities Commission v. *Pollak,* 343 U.S. 451, 468-69 (1952) (Douglas, J., dissenting opinion). *See also* Black, *He Cannot Choose But Hear: The Plight of the Captive Auditor,* 53 Colum. L. Rev. 960 (1953). There is no captive audience in this case. There is no coercion to read unwanted mail, as the recipient is free to discard the utility's message, unread, the minute he receives it.

The recognition by the court below of an absolute right of privacy superior to the First Amendment is in conflict with the approach taken by this Court of balancing the right of privacy against other values. *Nixon* v. *Administrator of General Services,* 433 U.S. 425 (1977); *Carey* v. *Population Services International,* 431 U.S. 678 (1977); *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975); *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415 (1971). *See also* Emerson, *Toward a General Theory of the First Amendment,* 72 Yale L.J. 877, 926-27 (1963); Stone, *supra* note 12, at 256-72. Under a balancing approach, the court below should have weighed the importance of bill inserts as a means of expression against the extent of intrusion into the privacy of the home caused by this means of communication.

The importance of bill inserts as a means of communication to appellant cannot be disputed. Bill inserts are effective in reaching their intended audience; they are inexpensive (they can be mailed out without incurring any postage costs in addition to what must otherwise be incurred in mailing out bills); and they are most suitable for lengthy

messages on complicated subjects (they need not compete for attention with other messages as in newspapers).[21]

On the other side of the scale, bill inserts are possibly the least intrusive means of communication. They are much less intrusive than doorbell ringing and door-to-door communication which this Court approved in *Martin* v. *Struthers,* or communication by telephone. The homeowner may pick up the mail at his convenience and may dispose of unwanted messages at will. If the standard here is to be the one adopted by the Court in *Cohen,* then it can hardly be argued that "substantial privacy interests are being invaded in an essentially intolerable manner" when the unwilling recipient can avoid all but momentary offense by merely throwing the material away. The proper solution here, as in *Cohen* v. *California,* 403 U.S. at 21, is for the recipients to "avoid further bombardment of their sensibilities simply by averting their eyes."

The trivial burden of disposing of unwanted mail is hardly sufficient to justify the far-reaching infringement of First Amendment rights approved by the court below. Professor Haiman concluded that "the act of throwing away unwanted mail strikes this writer as such a simple operation that it is difficult to understand the necessity for any further restrictions." *Speech* v. *Privacy: Is There A Right Not To Be Spoken To?,* 67 Nw. U.L. Rev. 153, 180 (1972). Most commentators are in agreement with this view. The Privacy Protection Study Commission quoted with approval the testimony of the U.S. Postal Service expressing the view that " 'the recipient of the unwanted mail matter has the

[21] Also to be considered in the balance is the nature of the means of communication. " '[T]he use of the mails is almost as much a part of free speech as the right to use our tongues. . . .' " *Lamont* v. *Postmaster General,* 381 U.S. at 305 (quoting *Milwaukee Publishing Co.* v. *Burleson,* 255 U.S. 407, 437 (1921) (Holmes, J., dissenting opinion)) (footnote omitted).

option of throwing it away. Indeed, an individual probably finds it easier to avoid reading his mail than to escape from any other form of advertising.' " *Privacy Commission Report, supra* note 16, at 149 (quoting *Mailing Lists, Hearings Before the Privacy Protection Study Commission,* 253-54 (Dec. 11, 1975)). David Ballard expressed a similar view recently when he wrote that "[u]nder *Cohen,* given the indispensability of direct mail advertising to the communication of various types of expression, it is questionable whether, at least when obscenity is not involved, direct mail advertising can be viewed as such an intolerable invasion of privacy so as to be prohibited." Ballard, *supra* note 16, at 521. Similarly, Professor Schwartz observed that "the First Amendment right to communicate, given today's emphasis on the value of free expression, seems to outweigh the interests of the homeowner in privacy," *The Mail Must Not Go Through—Propaganda and Pornography,* 11 U.C.L.A. L. Rev. 805, 858 (1964). Finally, a commentator observed that "[t]he measure of an individual's privacy should consist not in his total protection from stimuli, but rather in his ability to avoid further contact with stimuli which the individual has tasted and found unpalatable. The government thus has an interest in protecting its citizenry from those who wish to compel continued contact with ideas already rejected, but not in providing a protective cocoon against initial exposure." 48 Wash. L. Rev. 667, 682 (1973) (footnote omitted).

2. The Commission's Bill Insert Ban Does Not Leave Open Ample Alternative Channels for Communication of the Utility's Positions on Controversial Matters of Public Policy.

This branch of the case raises two important questions for the Court's consideration. First, does the state, or the party whose free speech rights are being infringed, have

the burden of proof on the issue of the availability of ample alternative means of communication? The Court of Appeals ruled that the party whose free speech rights are being infringed has this burden (Appendix A, p. 10a). This Court has apparently never decided this question. However, it has indicated that government restrictions of speech and the press are "'presumptively unconstitutional,'" *Nebraska Press Association* v. *Stuart,* 427 U.S. 539, 558 (1976) (quoting *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations,* 413 U.S. 376, 396 (1973) (Burger, C.J., dissenting opinion)), and that the burden is on the government to justify the restriction, *Elrod* v. *Burns,* 427 U.S. at 362. Consistent with these views, the government should have the duty to ascertain, prior to instituting time, place, and manner restrictions, that those whose freedom of speech is being infringed have ample alternative channels for the expression of their views.

Second, regardless of which party has the burden of proof on this issue, was the Court of Appeals correct in concluding that the Commission's bill insert ban leaves open ample alternative channels for the communication of the utility's messages (Appendix A, pp. 9a-10a)? In a superficial analysis of this issue, the Court of Appeals reasoned that since the Commission's ban applies only to bill inserts, all other means of communication that were previously available remain available. *Id.* The court made no attempt to evaluate whether these other means of communication are more expensive, and whether they are effective means for communicating the utility's message. The Court of Appeals simply ignored the controlling decision of this Court under which these factors must be considered. In concluding that alternatives to the use of "For Sale" signs for selling real estate "are far from satisfactory" in *Linmark Associates, Inc.* v. *Township of Willingboro,* 431

U.S. at 93, this Court examined the relative cost of alternatives (they "involve more cost and less autonomy than 'For Sale' signs"), their likelihood of reaching the intended audience (they "are less likely to reach persons not deliberately seeking sales information"), and their effectiveness (they "may be less effective media for communicating the message that is conveyed by a 'For Sale' sign in front of the house to be sold").[22]

The uncontradicted evidence presented by Con Edison in this case, which the Court of Appeals totally ignored, is that other means of communication involve more cost, are less likely to reach customers, and may be less effective (R112-15). As shown by this evidence, a separate mailing would be prohibitively expensive, each mailing costing at least an additional $210,000 in postage alone. Television and radio advertising are not suitable means of communicating lengthy messages on complicated subjects. And newspaper advertising is more costly and less effective than bill inserts. This Court has not hesitated to review the records in First Amendment cases to assure that constitutional principles are properly applied. *In Re Primus,* 436 U.S. at 434. *See also* L. Tribe, *supra,* §12-8, at 603. We request this Court to review the record in this case so that a gross misapplication of First Amendment principles may be corrected.

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[22] Alternative means of communication were available in *Linmark,* but the problem in that case, as in this case, was that they were more costly and less effective. In *Linmark* the record showed that only thirty per cent of the inquiries to plaintiff's real estate office were a result of "For Sale" signs being posted on residences. *Linmark Associates, Inc.* v. *Township of Willingboro,* 535 F.2d 786, 792 n.5 (3d Cir. 1976), *rev'd,* 431 U.S. 85 (1977). Thus, seventy percent of the inquiries to plaintiff's real estate office were a result of other means of advertising. Yet, this Court concluded that the ban on the use of "For Sale" signs did not leave plaintiff ample alternative channels for communication.

POINT II

The Court Below Erred in Rejecting Con Edison's Claim That the Commission's Bill Insert Ban Is Unconstitutionally Vague.

It is a basic principle of due process under the Fourteenth Amendment to the United States Constitution that an enactment is void for vagueness if its prohibitions are not clearly defined. *Grayned* v. *City of Rockford,* 408 U.S. 104, 108 (1972). *See also First National Bank of Boston* v. *Bellotti,* 435 U.S. at 785 n. 21; *Hynes* v. *Mayor of Oradell,* 425 U.S. 610 (1976); *Buckley* v. *Valeo,* 424 U.S. at 40-41; *Coates* v. *City of Cincinnati,* 402 U.S. 611 (1971). Moreover, "stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." *Smith* v. *California,* 361 U.S. 147, 151 (1959).

The vice of vagueness in the First Amendment area is threefold: (1) it may trap the innocent by failing to provide fair warning; (2) it does not provide explicit standards for those who apply them, thus fostering arbitrary and discriminatory enforcement; and (3) it operates to inhibit the exercise of First Amendment freedoms. *Grayned* v. *City of Rockford,* 408 U.S. at 108-09.

The Commission's ban on the use of bill inserts which express the utilities' positions on "controversial matters of public policy" is so vague that Con Edison can only guess at its meaning. The Commission has provided absolutely no standards for determining what are "controversial matters of public policy." Special Term properly concluded that the Commission did not adequately define the messages to which its ban applies (Appendix C, pp. 27a-28a).

The Commission's order is also illustrative of the second vice of vagueness: the failure to provide adequate standards for those applying the regulation, resulting in arbitrary and discriminatory enforcement, *Grayned* v. *City of Rockford,* 408 U.S. at 108-09. It is no answer to a claim of vagueness to say, as the Appellate Division did, that "[w]e have little doubt" that the regulators and the regulated will be able to determine the subjects to which the prohibition applies (Appendix B, p. 19a). This is precisely the result which the vagueness doctrine is designed to prevent. Under that doctrine, unrestricted discretion may not be vested in a state official with respect to regulating activities protected by the First Amendment. As this Court stated in *Kunz* v. *New York,* 340 U.S. 290, 295 (1951):

> It is sufficient to say that New York cannot vest restraining control over the right to speak on religious subjects in an administrative official where there are no appropriate standards to guide his actions.

See also Cantwell v. *Connecticut,* 310 U.S. 296 (1940); *Lovell* v. *Griffin,* 303 U.S. 444.

There are no standards to guide the Commission's actions. Its future pronouncements, if any, as to which matters are controversial and which are not will amount to nothing more than arbitrary and subjective applications of a vague standard (*see, e.g.,* Appendix E, pp. 43a, 44a; Appendix G, pp. 66a-67a).

CONCLUSION

This appeal raises several important First Amendment issues which warrant plenary review. First, are restrictions on speech which discriminate among speakers in terms of subject matter consistent with the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"? *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270 (1964). Is the government's obligation of neutrality toward speakers violated when it imposes a restriction on speech applicable to parties on one side of a public issue?

Second, is the bill insert ban approved by the court below a valid time, place and manner regulation? If it is determined that the Commission's ban advances the State's asserted interest, this case presents a conflict between the right of privacy of the home and the right to communicate. Does the superficial analysis of the court below comport with this Court's requirements for determining whether the State's restriction on speech leaves the regulated party ample alternative channels for communicating its views? Who shall bear the burden of proof on this issue?

Finally, did the court below review the regulation at issue with proper sensitivity to First Amendment values to insure that it will not have an inhibiting effect on speech because of its vagueness?

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

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July 27, 1979

OTHER STATUTORY PROVISIONS INVOLVED

Other Statutory Provisions Involved

The New York Public Service Law (McKinney 1955 and Supp. 1978-1979) provides in relevant part:

§ 2. Definitions

* * *

10. The term "gas plant," when used in this chapter, includes all real estate, fixtures and personal property operated, owned, used or to be used for or in connection with or to facilitate the manufacture, conveying, transportation, distribution, sale or furnishing of gas (natural or manufactured or mixture of both) for light, heat or power, but does not include property used solely for or in connection with the business of selling, distributing or furnishing of gas in enclosed containers.

* * *

12. The term "electric plant," when used in this chapter, includes all real estate, fixtures and personal property operated, owned, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power; and any conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat or power.

* * *

§ 4. The public service commission

1. There shall be in the department of public service a public service commission, which shall possess the powers and duties hereinafter specified, and also all powers necessary or proper to enable it to carry

out the purposes of this chapter. The commission shall consist of five members, to be appointed by the governor, by and with the advice and consent of the senate. A commissioner shall be designated as chairman of the commission by the governor to serve in such capacity at the pleasure of the governor or until his term as commissioner expires whichever first occurs. No more than three commissioners may be members of the same political party unless, pursuant to action taken under subdivision two, the number of commissioners shall exceed five, and in such event no more than four commissioners may be members of the same political party.

* * *

§ 66. General powers of commission in respect to gas and electricity

The commission shall:

1. Have general supervision of all gas corporations and electric corporations having authority under any general or special law or under any charter or franchise to lay down, erect or maintain wires, pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places of any municipality for the purpose of furnishing or distributing gas or of furnishing or transmitting electricity for light, heat or power, or maintaining underground conduits or ducts for electrical conductors, and all gas plants and electric plants owned, leased or operated by any gas corporation or electric corporation.

* * *

12-a. Have power to fix and alter the format and informational requirements of bills utilized by public

and private gas corporations, electric corporations and gas and electric corporations in levying charges for service, to assure simplicity and clarity and to require indication of any adjustment charges, including but not limited to fuel adjustments, in monetary amounts. The commission shall further ensure periodic explanation of applicable rates and rate schedules for the purpose of assisting customers in making the most efficient use of energy.

Supreme Court, U.S.
FILED
JUL 27 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

APPENDIX TO JURISDICTIONAL STATEMENT

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Appendix A

Opinion of the Court of Appeals of the State of New York, May 1, 1979

STATE OF NEW YORK
COURT OF APPEALS

---

3 No. 150

In the Matter of

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

VS.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondent.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

VS.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondent.

---

3 No. 151

In the Matter of

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,

Appellant,

VS.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondent.

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(150) (151) JOSEPH D. BLOCK & PETER GARAM, NY City, *for appellant* in (150).

Appendix A

TELFORD TAYLOR, WALTER A. BOSSERT, JR., & DAVISON W. GRANT, NY City, *for appellant* in (151).

HOWARD J. READ & PETER H. SCHIFF, Albany, *for respondent* in each matter.

COOKE, Ch. J.:

We determine here whether the Public Service Commission exceeded its statutory authority or impinged upon First Amendment rights by restricting certain advertising and promotional practices of public utilities. For the reasons outlined, we hold that the Public Service Commission was within its authority in imposing the restrictions, and that petitioners' expressional rights were not unconstitutionally impaired.

I

Respondent, New York Public Service Commission, exercises regulatory and supervisory powers over public utilities licensed to operate in the State (see Public Service Law, §§5, 66). In 1973 the Commission, reacting to the Arab oil embargo, prohibited electric corporations "from promoting the use of electricity through the use of advertising, subsidy payments * * * or employee incentives". Although the immediate crisis created by the embargo dissipated, no repeal of the promotional ban was effected by the Commission. Then, in July of 1976, the Commission issued a "Notice of Proposed Policy Statement and Request for Comments on Advertising by Public Utilities and Electric Promotion Practices". Petitioners, Central Hudson Gas & Electric Corporation and Consolidated Edison Company of New York, Inc., as well as other interested parties, responded to the notice, arguing for relaxation of the promotional ban on both policy and constitutional grounds.

Appendix A

After reviewing the comments received and conducting its evaluation of the problem, the Commission rendered a decision on February 25, 1977 entitled "Statement of Policy on Advertising and Promotional Practices of Public Utilities". In its statement, the Commission concluded "that the existing ban on promotion of electricity sales should be continued". Its reasoning for continuation of the prohibition was succinctly stated: "[C]onservation of energy resources remains our highest priority * * *. It is reasonable to believe that a continued proscription of promotion of electric sales will result in some dampening of unnecessary growth so that society's total energy requirements will be somewhat lower than they would have been had electric utilities been allowed to promote sales."

That same day, the Commission released an order addressing the topic of utility bill inserts. By that order, the Commission directed all utilities subject to its jurisdiction to "discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy". This restriction, too, was partially explained in the Commission's policy statement: "We believe that using bill inserts to proclaim a utility's viewpoint on controversial issues * * * is tantamount to taking advantage of a captive audience, since the consumer cannot avoid receiving the utility's message."

Dissatisfied with the decision, Central Hudson and Con Edison petitioned for a rehearing, which was denied by the Commission on July 14, 1977. Central Hudson then commenced an article 78 proceeding challenging the advertising and insert bans. Con Edison instituted a separate proceeding in which it objected to only the billing insert measure. Special Term, in brief opinions, ruled that while the Commission had power to impose the promotional advertising

Appendix A

restriction, it lacked authority to prohibit the use of bill inserts. On appeal, the Appellate Division modified, sustaining both branches of the Commission's determination.

II

At the outset, petitioners challenge the Commission's statutory authority to regulate the content of billing envelopes and the promotional advertising practices of public utilities. It is, of course, a fundamental postulate of administrative law that the Public Service Commission, like other agencies, is possessed of only those powers expressly delegated by the Legislature, together with those powers required by necessary implication (see, e.g., *Suffolk County Builders Association, Inc. et al* v *County of Suffolk, et al,* —— NY2d —— [decided 4/5/79]; *Matter of National Merchandising Corp.* v *Public Serv. Comm.,* 5 NY2d 485, 489; cf. *Matter of Bates* v *Toia,* 45 NY2d 460, 464). Nevertheless, the absence of explicit statutory authorization need not be fatal to a given assertion of regulatory power by the Commission. For, as we have recognized previously, the Legislature on occasion broadly declares its will, specifying only the goals to be achieved and policies to be promoted, while leaving the implementation of a program to be worked out by an administrative body (see, e.g., *Matter of Sullivan County Harness Racing Assn.* v *Glasser,* 30 NY2d 269, 276; cf. *Matter of Bates* v *Toia, supra*). In such cases, the sheer breadth of delegated authority precludes a precise demarcation of the line beyond which the agency may not tread. What is called for, rather, is a realistic appraisal of the particular situation to determine whether the administrative action reasonably promotes or transgresses the pronounced legislative judgment (cf. *Matter of Broidrick* v *Lindsay,* 39 NY2d 641, 646).

Appendix A

In the context of this case, without doubt, the Legislature has conferred vast power upon the Public Service Commission (see, e.g., Public Service Law, §§4, 5, 65, 66; cf. *Matter of Public Serv. Comm. of State of N.Y.* v *Jamaica Water Supply Co.,* 42 NY2d 880, affg 54 AD2d 10). Indeed, the Commission is expressly endowed with "all powers necessary or proper to enable it to carry out the purposes of" the Public Service Law (Public Service Law, §4, subd 1). Added to this is the Commission's specific power of "general supervision of all gas corporations and electric corporations" and "all gas plants and electric plants" (Public Service Law, §66, subd 1).

In light of current exigencies, one of the policies of any public service legislation must be the conservation of our vital and irreplaceable resources. The Legislature has but recently imposed upon the Commission a duty "to encourage all persons and corporations * * * to formulate and carry out long-range programs * * * [for] the preservation of environmental values and the conservation of natural resources" (Public Service Law, §5, subd 2). Implicit in this amendment is a legislative recognition of the serious situation which confronts our State and nation. More important, conservation of resources has become an avowed legislative policy embodied in the Commission's enabling act (see, also, *Matter of New York State Council of Retail Merchants* v *Public Serv. Comm. of State of N.Y.,* 45 NY2d 661, 673-674).

It necessarily follows, therefore, that the Commission possesses ample power to prescribe reasonable measures designed to prevent wasteful consumption or unneeded expansion of utility services. By prohibiting promotional advertising of electric power, the Commission has taken precisely such a step. In its expertise, the Commission could have reasonably concluded that promotional advertising might tend to increase injudicious and unnecessary con-

sumption of electrical power. Given this, the authority for the advertising ban becomes apparent.

Nor did the Commission exceed its jurisdiction by prohibiting the inclusion of inserts in utility billing envelopes. The Legislature has granted the Commission express authority "to fix and alter the format and informational requirements of bills utilized by public and private gas corporations, electric corporations and gas and electric corporations in levying charges for service, to assure simplicity and clarity * * *" (Public Service Law, §66, subd 12-a).[1] Incident to that authority and in the same subdivision it is provided that the "commission shall further ensure periodic explanation of applicable rates and rate schedules for the purpose of assisting customers in making the most efficient use of energy". Thus, the Legislature has authorized the Commission to regulate not only the format and informational content of the bill itself but the entire billing communication. Petitioners invite us to read these provisions narrowly, restricting the Commission's jurisdiction to the actual billing instrument itself rather than extending it to the entire contents of the billing envelope. This artificial distinction must be rejected. By necessary implication, the statute, if it is to amount to more than an empty adage, must provide the Commission with authority to oversee the distribution of bill inserts. Were the agency's

[1] Added by Laws of 1977, chapter 527, approved Aug. 1, 1977. In a case such as this one, in which the effectiveness of the Public Service Commission's prohibitions has been judicially stayed by interim orders during the course of this litigation such that they have not yet attained practical vitality, we have no difficulty in applying to this appeal the principle that we must decide the case on the basis of the law as it exists today. (*Strauss* v *University of the State of New York*, 2 NY2d 464, 465.) It would be but a futile exercise to annul the PSC determination on the basis of prior law only to have the agency validly repromulgate its order under the recent amendment.

power construed to extend only to the bill itself, control over informational content and format "to assure simplicity and clarity" could be severely hampered if not totally undermined. While the bill might be simple and clear, utilities could literally inundate consumers with a morass of irrelevant and conflicting data, forms, and pamphlets, causing confusion and oversight. Indeed, granting the utilities unfettered discretion to include all materials would negate the legislative goals of simplicity and clarity. It is difficult to conceive a legislative intent to permit such a disordered pattern. A more acceptable alternative is an interpretation of the statute empowering the Commission to regulate the billing process as a whole.

This construction becomes all the more reasonable when viewed in the context of the entire regulatory scheme. Rather than restricting the PSC's authority, the Legislature has invested that agency with all powers needed to carry out the purposes of the Public Service Law, as well as power to supervise generally the operation of electric and gas corporations and electric and gas plants (Public Service Law, §4, subd 1; §66, subd 1). In view of the expansive definitions of electric and gas plants (Public Service Law, §2, subds 10, 12), the Commission's supervisory authority must be taken to extend to those "useful and necessary services [and property] which facilitate" or are used in connection with the "manufacture, conveying, transportation, distribution, sale, or furnishing" of utility power (*Matter of National Merchandising Corp.* v *Public Serv. Comm.*, 5 NY2d 485, 490-491; Public Service Law, §2, subds 10, 12). Control of the billing procedure, a process necessarily adjunct to the furnishing of utility service, thus fits neatly into the PSC's supervisory role. This supervisory power, combined with the more specific billing regulatory authority,

provides ample justification for Commission oversight of billing envelope content.

To summarize, the Public Service Commission is possessed of sufficient statutory power to prohibit the promotional advertising of electricity and to prescribe the content of electric and gas corporation consumer billing envelopes.

III

The Commission's actions being within the limits of its delegated authority, petitioner's First Amendment contentions must be addressed. The constitutional attack is directed at both the outright prohibition of promotional advertising and the ban on bill enclosures dealing with controversial topics.

Analysis in the First Amendment area proceeds on one of two tiers, depending upon the nature of the restriction which government has imposed (see, e.g., Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv L Rev 1482). At one level, government regulation designed to suppress traditional communicative activity because of its content or potential impact is subject to the most rigorous scrutiny. Absent some compelling justification, such as a likelihood that speech will incite "imminent lawless action", content-oriented restrictions may not stand (*Brandenburg* v *Ohio,* 395 US 444, 447; see *Hess* v. *Indiana,* 414 US 105; *United States* v *O'Brien,* 391 US 367, 376-377; see, generally, Gunther, Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History, 27 Stan L Rev 719). On the second tier are those governmental measures which, although not directly aimed at all communication, inhibit the free flow of information or ideas. The validity of such a restraint is gauged by balancing the

various competing interests, with due regard for the status of First Amendment rights in our constitutional scheme. Thus, so long as a facially neutral regulation does not unduly constrict the exercise of protected rights, it is not unconstitutional (compare *Buckley* v *Valeo,* 424 US 1, 60-84, with *Schneider* v *State,* 308 US 147; see, generally, Note, Less Drastic Means and the First Amendment, 78 Yale L J 464).

A

In the present case, the prohibition on billing inserts, which was designed to vindicate the privacy rights of utility customers, constitutes at best an indirect restraint upon expressional activity. It extends not to all speech of a prescribed content, but only to one manner of communication. No one viewpoint is singled out for special treatment, nor is the general right to express ideas in other forums effected. In short, the PSC is concerned with but one particular means of expression, and then only to a limited extent.

It is well settled that government may impose reasonable restrictions upon the time, place and manner of communication (see, e.g., *Grayned* v *City of Rockford,* 408 US 104, 115-117; *Kovacs* v *Cooper,* 336 US 77; *Cox* v *New Hampshire,* 312 US 569, 575). To constitute a valid time, place and manner restriction, a regulation must be content neutral, supported by a significant governmental interest, and not foreclose alternative channels of expression (e.g., *Va. Pharmacy Bd.* v *Va. Consumer Council,* 425 US 748, 771). Respondent PSC urges that its billing insert decree satisfies these criteria. It is correct.

There is no doubt but that the regulation leaves open numerous alternative means of communication. On its face, the ban only reaches expressional activity conducted through the billing envelope. Whatever other modes of

speech were open to utilities prior to the effective date of the Commission order remain available. That the cost of utilizing these alternative channels may be higher is not determinative, especially where, as here, petitioner has wholly failed to demonstrate that it will be effectively precluded from exercising its rights (see, e.g., *Kovacs* v *Cooper,* 336 US 77, 88-89).

In a similar vein, the ban unquestionably fosters an important governmental interest. Consumers of utility services, like many others in captive situations, have no choice concerning receipt of a periodic statement from the power company. Whatever materials are enclosed in the envelope are destined to come in contact with the addressee. When the insert espouses the utility's viewpoint on a controversial question, it is as likely to offend the sensibilities of the recipient as it is to elicit agreement. Government need not stand idly by and deny assistance to those who are inflamed by having a particular opinion foisted upon them. "Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; we see no basis for according the printed word * * * a different or more preferred status because [it is] sent by mail. The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another" (*Rowan* v *Post Office Dept.,* 397 US 728, 737; see, also, *Martin* v *Struthers,* 319 US 141; Black, He Cannot Choose But Hear: The Plight of the Captive Auditor, 53 Colum L Rev 960). A governmental agency such as the PSC may take appropriate steps to protect this privacy right of its constituents (*Kovacs* v *Cooper, supra* at pp 86-89; *Cohen* v *California,* 403 US 15, 21-22; see, also, *Public Utilities Comm'n* v *Pollak,* 343 US 451, 466-469) [Douglas, J. dissenting]).

Finally, the regulation, properly viewed, is not content oriented. True, the directive sweeps within its strictures only those bill inserts treating controversial topics. But it does not discriminate against persons of any particular political stripe or prohibit the expression of any one position on a hotly debated issue. In short, the restriction endeavors, in an objective and evenhanded manner, to limit billing insert materials to the innocuous and noncontroversial. Given these circumstances, where the communication intrudes upon the privacy of the home, such a limitation does not offend the First Amendment (*Erznoznik* v *City of Jacksonville,* 422 US 205, 209; see *Greer* v *Spock,* 424 US 828, 838-839; *Lehman* v *City of Shaker Heights,* 418 US 298, 302-304; see, Tribe, American Constitutional Law, §12-21, at pp 690-691, & n 21).

Accordingly, because it satisfies the above criteria, the PSC order banning bill inserts constitutes a valid time, place and manner regulation.

B

To be contrasted is the Commission directive proscribing all promotional advertising of electric service. Rather than an oblique inhibition, this order works a direct curtailment of expressional activity: an entire category of speech is prohibited because of its potential impact upon the society. As noted, content-oriented regulations have been subjected to an exacting standard of review, the precise level of that standard bing determined by reference to the nature of the communication.

Until recently, communication in the commercial sphere would not have been accorded any First Amendment recognition (compare *Valentine* v *Chrestensen,* 316 US 52, with *Bigelow* v *Virginia,* 421 US 809). While now entitled to a

measure of constitutional protection, the full panoply of safeguards afforded more traditional communications does not necessarily attach (*Ohralik* v *Ohio State Bar Assn.*, 436 US 447, 456). Our task, therefore, is to apply the emerging principles of the commercial speech doctrine to the present context.

A common theme sounding in commercial speech cases is the notion that society, as a whole, "may have a strong interest in the free flow of commercial information" (*Va. Pharmacy Bd.* v *Va. Consumer Council,* 425 US 748, 764, 765; see, e.g., *Linmark Associates, Inc.* v *Willingboro,* 431 US 85, 92; *Bates* v *State Bar of Arizona,* 433 US 350, 364-365). In a market system such as ours, allocation of resources is largely accomplished through a confluence of private economic decisions. Society possesses a vital interest in ensuring that these economic decisions are consummated in an intelligent, well informed atmosphere, and the free flow of commercial information is indispensable to the attainment of this goal (e.g., *Va. Pharmacy Bd.* v *Va. Consumer Council, supra,* at p 765).

The individual consumer, too, has a stake in the availability of commercial information. To many, knowledge of the price and availability of goods and services takes on an importance overshadowing even the most urgent political debate. Especially in these days of rapidly fluctuating prices, the free flow of commercial information plays a central role in consumer decision making. Indeed, it could mean the difference between enjoyment or nonenjoyment of basic necessities (see, *Va. Pharmacy Bd.* v *Va. Consumer Council, supra,* at p 764).

Recognition of these interests accounts, in large measure, for the protections extended commercial speech. In a competitive market, information concerning the availability and

price of goods and services is essential to consumers. Analysis of precedent bears out this observation. In *Va. Pharmacy Bd.* v *Va. Consumer Council* (425 US 748, *supra*), for example, the State sought to prohibit advertising of prescription drug prices. Acknowledging the State's strong interest in ensuring the professionalism of pharmacists, the Supreme Court nonetheless found the societal and individual benefits flowing from price advertising in this competitive industry to be superordinate: "Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. * * * But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering" (Id., at p 770). Similarly, in *Bates* v *State Bar of Arizona* (433 US 350, *supra*), a disciplinary rule restricting advertising by attorneys was invalidated. In so doing, the court again highlighted the role of commercial information in a free enterprise economy, commenting that "such speech serves individual and societal interests in assuring informed and reliable decisionmaking" (Id., at p 364). The various justifications offered in support of a ban on attorney advertising were demed insufficient to override these interests (Id., at pp 366-379).

By the same token, where the importance of the free flow of commercial information is diminished, either because of market structure of the industry or hazards associated with a particular means of communication, First Amendment protection reaches its nadir.[2] This dichotomy is aptly illus-

[2] We are not suggesting that the fate of a business entity's First Amendment rights turns upon its economic self interest (see *First National Bank of Boston* v *Bellotti,* 435 US 765). To the contrary, petitioners' economic interest would be well served by promotional advertising. Rather, it is the beneficial or detrimental impact of commercial information upon society which assumes importance on analysis.

trated by *Ohralik* v *Ohio State Bar Assn.* (436 US 447, *supra*), where a prohibition of in-person solicitation by attorneys was upheld. *Ohralik* recognizes the "'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." For this reason, commercial speech occupies a "subordinate position in the scale of First Amendment values" (Id., at p 455-456). Thus, a particular mode of advertising which would not well serve the societal interest in informed decisionmaking, such as in-person solicitation, may constitutionally be banned: "In-person solicitation is as likely as not to discourage persons needing counsel from engaging in a critical comparison of the 'availability, nature, and prices' of legal services * * * it actually may disserve the individual and societal interest * * * in facilitating 'informed and reliable decisionmaking'" (Id., at pp 457-458). Such speech, *Ohralik* teaches, may be prohibited in the public interest.

Applying these principles, the ban on promotional advertising of electricity is consistent with First Amendment strictures. Public utilities, from the earliest days in this State, have been regulated and franchised to serve the commonweal. Our policy is "to withdraw the unrestricted right of competition between corporations occupying * * * the public streets * * * and supplying the public with their products or utilities which are well nigh necessities" (*People ex rel. New York Edison Co.* v *Willcox,* 207 NY 86, 99; *Matter of New York Electric Lines Co.,* 201 NY 321). The realities of the situation all but dictate that a utility be granted monopoly status (see *People ex rel. New York Electric Lines Co.* v *Squire,* 107 NY 593, 603-605). To protect against abuse of this superior economic position, extensive governmental regulation has been deemed a nec-

essary coordinate (see *People ex rel. New York Edison Co.* v *Willcox, supra,* at pp 93-94).

In view of the noncompetitive market in which electric corporations operate, it is difficult to discern how the promotional advertising of electricity might contribute to society's interest in "informed and reliable" economic decisionmaking. Consumers have no choice regarding the source of their electric power; the price of electricity simply may not be reduced by competitive shopping. At best consumers may seek, through the Public Service Commission, to limit future increases in electrical prices. Surely promotional advertising would provide no information of assistance in this respect.

Indeed, promotional advertising is not at all concerned with furnishing information as to the "availability, nature, and prices" of electrical service. It seeks, instead, to encourage the increased consumption of electricity, whether during peak hours or off-peak hours. Thus, not only does such communication lack any beneficial informative content, but it may be affirmatively detrimental to the society. It would not strain the bounds of judicial notice for us to take cognizance of the present energy crisis. Conserving diminishing resources is a matter of vital state concern and increased use of electrical energy is inimical to our interests. Promotional advertising, if permitted, would only serve to exacerbate the crisis. In short, this constitutes a compelling justification for the ban.

Accordingly, the order of the Appellate Division in each case should be affirmed, with costs.

* * * * *

In each case:

Order affirmed, with costs. Opinion by Cooke, Ch.J. Concur: Jasen, Gabrielli, Jones, Wachtler and Fuchsberg, JJ.

Decided May 1, 1979

Appendix B

Opinion of the New York Supreme Court, Appellate Division, Third Judicial Department, July 27, 1978

SUPREME COURT
STATE OF NEW YORK

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT

33186

In the Matter of

CONSOLIDATED EDISON CO. OF NEW YORK,
Respondent,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellant.

CONSOLIDATED EDISON CO. OF NEW YORK,
Respondent,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellant.

33185

In the Matter of

CENTRAL HUDSON GAS & ELECTRIC CORP.,
Respondent-Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellant-Respondent.

Appendix B

Argued, June 20, 1978. Decided, July 27, 1978.

Before:

HON. A. FRANKLIN MAHONEY,
Presiding Justice,
HON. LOUIS M. GREENBLOTT,
HON. MICHAEL E. SWEENEY,
HON. ROBERT G. MAIN,
HON. ANN T. MIKOLL,
Associate Justices.

APPEAL, in the first above-entitled proceeding, from a judgment of the Supreme Court at Special Term (ROGER J. MINER, J.), entered March 6, 1978 in Albany County, which (1) granted petitioner's application, in a proceeding pursuant to CPLR article 78, to vacate an order of the Public Service Commission (PSC) and (2) declared that the order was unconstitutional.

CROSS APPEALS, in the second above-entitled proceeding, from a judgment of the Supreme Court at Special Term (ROGER J. MINER, J.), entered March 14, 1978 in Albany County, which granted in part and dismissed in part petitioner's application, in a proceeding pursuant to CPLR article 78, to vacate an order of the Public Service Commission (PSC).

* * * * *

GREENBLOTT, J.

We are here concerned with two separate appeals but because of the similarity of issues we are considering them together.

The first appeal concerns an order of the Public Service Commission (PSC) issued on February 25, 1977 which provided, in pertinent part, that "[a]ll utilities subject to the jurisdiction of this Commission shall discontinue the

practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy". Petitioner, Consolidated Edison Company of New York, Inc. (Con Edison), challenged the validity of that portion of the order and Special Term annulled the order to the extent that it prohibited Con Edison from utilizing bill inserts as a means of disseminating its views on controversial matters of public policy. Special Term concluded that there was no basis in the statutory powers accorded the PSC which would authorize the total ban of such inserts. We disagree.

The PSC has general powers of supervision and regulation over activities of gas and electric utilities. (See, e.g., Public Service Law, § 66.) The issue before us is whether, given these powers, the PSC may prevent management from expressing its political positions in a manner that is inevitably subsidized by the consumer, particularly when the PSC places no restrictions on advertisement by any other means. We hold that it may.

Con Edison does not dispute that the PSC has a duty to allocate costs for political advertising to accounts chargeable to shareholders (16 NYCRR ch 3, subch F, account 426.4). An obvious corollary of this duty is the requirement that consumers not be charged with the costs of these political activities. The PSC necessarily has the duty to protect consumers from such charges.

The PSC protests that, given the manner of airing its views chosen by Con Edison, it cannot fulfill that duty. We agree that it would be impossible to separate out the costs attributable to mailing the bills (a customer expense) from the costs attributable to mailing out management statements (a shareholder expense). Unless the PSC allocates all the costs of mailing as well as costs of stuffing

the envelopes to the utility, management will benefit from a savings in postage and labor, a subsidy the PSC is empowered to prevent. That the mailings would not cost the consumers anything is irrelevant since the issue is whether management's costs will be reduced through customer subsidy. In the battle of ideas, the utilities are not entitled to require the consumers to help defray their expenses.

We also reject the argument that the order is a violation of the utilities' free speech rights. Since the PSC's authority to issue the order and the necessity for doing so have been established, it is only a serious infringement of petitioner's constitutional rights that would warrant our annulment of the order. Here, there is no order barring Con Edison from expressing its opinions, nor is there an order barring the company from using the usual forms of advertisement. There is merely an order prohibiting the use of bill inserts to put forth management positions. This insignificant impingement on petitioner's rights is far outweighed by the PSC's duty to prevent customer subsidy of management's pamphleteering.

Nor do we view the order as being fatally vague. The order restricts only the utility's use of the bill insert to express its "position on controversial matters of public policy". The boundaries of the order need not be defined with utmost exactitude. We have little doubt that the PSC and the utilities are capable of distinguishing useful information for consumers (e.g., ways to conserve energy) from management's statement on the political issues of the day (e.g., benefits of nuclear energy). Further the order clearly contemplates expenditures that would qualify under account 426.4 of the PSC's accounting guidelines (16 NYCRR ch 3, subch F) as expenditures to influence public opinion. This is as detailed a statement of the contours of the order as the Constitution requires. Thus, the judgment entered March 6, 1978 must be reversed.

Appendix B

In the second appeal petitioner Central Hudson Gas & Electric Corp. (Central Hudson) cross-appeals from a judgment of Special Term insofar as the court dismissed its application to vacate that part of the order of the PSC issued on February 25, 1977 which classified expenses for advertising designed to sway public opinion as nonoperational and, therefore, chargeable to shareholders and which prohibited promotional advertising by electric utilities. For the reasons hereinbefore mentioned so much of the judgment as annulled that portion of the PSC order banning the use of bill inserts as a means of disseminating the utility's position on controversial matters of public policy should be reversed.

Concerning the prohibition of promotional advertising Central Hudson initially argues that no statutory authority empowers the PSC to order such a prohibition. The PSC relies on its statutory obligation to assure that rates charged are just and reasonable (Public Service Law, § 66) and upon subdivision 2 of section 5 of the Public Service Law which requires the PSC to encourage corporations subject to its jurisdiction "to formulate and carry out long-range programs, individually or cooperatively, for the performance of their public service responsibilities with economy, efficiency, and care for the public safety, the preservation of the environmental values and the conservation of natural resources." In justification, the PSC concluded that promotional advertising will increase the use of electricity causing spiraling price increases due to the fact that present rates do not cover the marginal cost of new capacity; that such advertising provides misleading signals that energy conservation is unnecessary; and that additional usage will increase the level of dependence on foreign sources of fuel oil. Considering the impact of promotional advertisement, the PSC is, in our view, statutorily empowered to prohibit such advertisement (Public Service Law, §§ 66, 5, subd 2).

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Central Hudson also argues that the prohibition violates its right to free speech as guaranted by the First Amendment to the United States Constitution. The Supreme Court has held that commercial speech falls within the protection of the First Amendment (*Virginia Pharmacy Bd.* v *Virginia Consumer Council,* 425 US 748). More recently, in a case where a prohibition was directed at speech itself, the Supreme Court held that the prohibition must be supported by a showing of a subordinating interest which is compelling and the burden is on the government to show such an interest (*First Nat. Bank of Boston* v *Bellotti,* —— US ——, 98 S Ct 1407). Upon our review of the record, it is the opinion of this court that the PSC has sufficiently demonstrated such an interest and, therefore, the prohibition of promotional advertising is not violative of Central Hudson's First Amendment right to freedom of speech.

Expenditures for political and related advertising activities have normally been excluded from operational expenses in the rate-making process and consequently have been chargeable to shareholders rather than ratepayers (16 NYCRR, ch 3, subch F, account 426.4). Central Hudson, however, argues against the expansion by the PSC of the definition of political and related advertising activities to include "all advertising which seeks to sway opinion—legislative, environmental, governmental, consumer or any other kind—to the industry's position on public policy disputes". Specifically included in this category by the PSC were expenses incurred in advertisements designed to influence public opinion concerning the development of nuclear energy. We agree with Special Term that the PSC may properly classify such expenditures pursuant to its

rate regulating activities and that the expanded definition propounded by the PSC is not overly broad, arbitrary or capricious (see *Southwestern Elec. Power Co.* v *Federal Power Comm.*, 304 F2d 29, cert den *sub nom. Alabama Power Co.* v *Federal Power Comm.*, 371 US 924). We also find no constitutional infirmity in such categorization.

The judgment entered March 6, 1978 should be reversed, on the law, without costs, and the order declared constitutional.

The judgment entered March 14, 1978 should be modified, on the law, by deleting so much thereof as annulled the PSC's directive; determination confirmed, and, as so modfied, affirmed, without costs.

SWEENEY, J. (concurring in part and dissenting in part). We respectfully dissent from that part of the majority's decision that holds that the Public Service Commission (PSC) is authorized to restrict political inserts in billing envelopes.

The PSC has only those powers conferred upon it by the Legislature and such additional powers as are incidental thereto or necessarily implied therefrom (*Matter of New York Tel. Co.* v *Public Serv. Comm. of State of N. Y.*, 59 AD2d 17). Two provisions of the Public Service Law are proposed by the PSC as authority in support of the ban in question. Initially, it is urged that subdivision 3 of section 65 of the Public Service Law is violated by the use of bill inserts in that it gives the managements of the utilities a benefit or advantage unavailable to others. It is clear, however, that subdivision 3 of section 65 relates to the prohibition of discrimination in the provision of services and no such discrimination is present in the instant case.

It is also argued by the PSC that subdivision 2 of section 66 of the Public Service Law authorizes the ban on bill inserts as that section empowers the PSC to "order such reasonable improvements as will best promote the public interest". In support of this argument, it is contended that the order in question is designed to protect utility subscribers generally from the conversion of the billing process into a subsidized forum for the dissemination of management's political views. The majority adopts the position of the PSC that the bill inserts would be inevitably subsidized by the consumer and consequently finds authority in the PSC to prohibit the use of bill inserts. In our view, however, it would not be impossible for the PSC to perform its duty of allocating the cost of these management statements to accounts chargeable to shareholders. We find nothing to prohibit the PSC from proportioning the costs so that the cost attributable to the placing of the bill inserts in envelopes and the mailing of the bill inserts would be chargeable to shareholders rather than ratepayers. Such an apportionment would prevent the subsidizing of management's views through the use of bill inserts. Consequently, we find no express or implied statutory power authorizing the PSC to ban the bill inserts prohibited by its order of February 25, 1977. We would, therefore, affirm both of the judgments here on appeal.

MAHONEY, P.J., and MIKOLL, J., concur with GREENBLOTT, J.; SWEENEY and MAIN, JJ., concur in part and dissent in part in a separate opinion by SWEENEY, J.

Judgment entered March 6, 1978 reversed, on the law, without costs, and order declared constitutional.

Judgment entered March 14, 1978 modified, on the law, by deleting so much thereof as annulled the Public Service Commission's directive; determination confirmed, and, as so modified, affirmed, without costs.

Appendix C

Opinion of the New York Supreme Court, Albany County, February 17, 1978

STATE OF NEW YORK

SUPREME COURT: COUNTY OF ALBANY

In the Matter of

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Petitioner,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondent.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Plaintiff,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Defendant.

Supreme Court, Special Term,

Albany County, February 17, 1978

* * * * *

ROGER J. MINER, J.

Plaintiff-petitioner (Con Edison) challenges the validity of the following portion of an order issued by defendant-respondent (PSC) on February 25, 1977: "All utilities subject to the jurisdiction of this Commission shall discontinue the practice of utilizing material inserted in bills

rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy." The challenge is predicated upon claims of First Amendment violation and unconstitutional vagueness.

The inquiry by PSC into the proper scope of leaflets enclosed with utility bills apparently was spawned by complaints addressed to a Con Edison bill insert relating to the need for nuclear power development. The complainants sought a PSC ruling that would permit them to enclose an insert in a future billing presenting their views on nuclear power. They also sought a ruling "that where the billing process has been used for purposes of advocating one side of a political and controversial issue of public importance, the forum of the billing packet must then be opened to contrasting points of view".

After receipt of the complaint, the PSC, in a separate administrative proceeding, began an over-all review of its policy concerning advertising by regulated utilities. The review culminated in a statement of advertising policy issued on February 25, 1977 and an "Order Implementing Certain Restrictions on Utility Advertising" issued the same date. The order included the bill-insert restriction quoted above. A request for a rehearing by Con Edison and others was denied by PSC order dated July 14, 1977. This order included a determination that a program allowing the expression of all points of view in bill inserts would be too difficult to administer.

In its policy statement and orders the PSC found that it would be unfair to subject ratepayers with differing points of view to the arguments of utilities through the billing mechanism; that the billing mechanism provides a unique means for utilities to present their views to rate-

payers and that the use of the mechanism for that purpose would confer an undue advantage; and that due to spacial limitations, bill inserts should convey only information clearly helpful to consumers.

A long-standing regulation of the PSC provides that expenditures for the purpose of influencing opinion or advancing the political objectives of an electric utility should be chargeable to shareholders in an income deductions account. (16 NYCRR ch II, subch F, art 1, Accounts, Income Accounts, Account No. 426.4.) It is proper to charge such expenditures to shareholders rather than ratepayers and an administrative determination as to the classification of the expenditures is within the discretion of the PSC. (*Southwestern Elec. Power Co.* v *Federal Power Comm.*, 304 F2d 29, cert den 371 US 924.) However, the order under attack purports to prohibit totally the dissemination of public policy positions by means of bill inserts. The court finds that this prohibition is improper and beyond the authority of the PSC.

It is well settled that commercial speech is protected by the First and Fourteenth Amendments to the United States Constitution. (*Bigelow* v *Virginia,* 421 US 809.) The time, place or manner, but not the content, of such speech may be regulated to effectuate a significant governmental interest. (*Virginia Pharmacy Bd.* v *Virginia Consumer Council,* 425 US 748; *Suffolk Outdoor Adv. Co.* v *Hulse,* 43 NY2d 483.) There can be no question that the ban upon the use of bill inserts constitutes a restriction upon commercial speech.

The PSC contends that compelling interests justify the order, but the arguments advanced in support of this contention are not persuasive. The use of bill inserts does not represent a subsidized means of presenting management's

views, since it is conceded that the cost of mailing would be the same whether or not the inserts were included with the bills. Moreover, the PSC may allocate any increased cost to the proper account. Consumers are not, therefore, required to subsidize views with which they do not agree. (Cf. *Abood* v *Detroit Bd. of Educ.,* 431 US 209.) The argument that subscribers constitute a captive audience to be protected from receiving certain mailed matter must be rejected, since the mailbox is not a constitutionally protected enclave. (*Lamont* v *Commissioner of Motor Vehicles,* 269 F Supp 880; cf. *Rowan* v *United States Post Off. Dept.,* 397 US 728.)

Although the PSC asserts that alternate channels of communications are open to management, such channels involve more cost, are less likely to reach subscribers and may be less effective. (*Linmark Assoc.* v *Willingboro,* 431 US 85.) The claim that bill inserts afford an undue preference or advantage to management within the meaning of subdivision 3 of section 65 of the Public Service Law is rejected, the cited section being inapplicable here.

The ban on the discussion of "controversial matters of public policy" through the medium of billing inserts presents a vague standard. (*Coates* v *City of Cincinnati,* 402 US 611; *Grayned* v *City of Rockford,* 408 US 104.) Controversy is defined as an occasion of disagreement or contention. (Webster's New International Dictionary [3d ed], p 497.) Public policy is the governing policy within a community and is a variable quantity. (Webster's New International Dictionary [3d ed], p 1836; Black's Law Dictionary [4th ed], pp 1317-1318.) It is apparent that great difficulty may arise in attempting to categorize a particular matter as a controversial question of public policy. The fact that the PSC has offered to provide ad-

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visory opinions as to whether specific issues are included in the ban illustrates the difficulty of defining the matters prohibited.

The PSC argues that the standard is virtually identical to that approved in *Red Lion Broadcasting Co.* v *Federal Communications Comm.* (395 US 367). In *Red Lion* radio broadcasting regulations implementing the fairness doctrine were under scrutiny. The regulations required radio stations to give reply time to answer any personal attack or political editorial involving a "controversial issue of public importance." Taking into account past adjudications by the FCC providing added precision to the regulations, the Supreme Court determined that the regulations as a whole, including the quoted phrase in context, were not so vague as to permit the FCC "to vindicate its own idiosyncratic conception of the public interest". (*Red Lion, supra*, p 395.) In the absence of prior definitions by the PSC and considering the context of the "controversial matters" phrase in the PSC order together with the unique status of the broadcasting industry, the holding in *Red Lion* cannot be applied to the issue of vagueness in the case at bar.

The PSC maintains that the privilege to disseminate utility bill inserts derives from the privilege of franchised monopoly and therefore may be regulated to assure its exercise in the public interest. Although this may be true as a general proposition, the regulation adopted here totally banning such inserts has no basis in the statutory powers accorded to the PSC. (*Matter of City of New York* v *Public Serv. Comm.*, 84 Misc 2d 1058, affd 53 AD2d 164; 48 NY Jur, Public Utilities § 9.)

Submit judgment for petitioner-plaintiff.

Appendix D

Final Judgment of the Court of Appeals of the State of New York, May 1, 1978

REMITTITUR

COURT OF APPEALS

STATE OF NEW YORK

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

3 No. 150

In the Matter of

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondent.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondent.

The appellant in the above entitled appeal appeared by Joseph D. Block and Peter Garam; the respondent appeared by Peter H. Schiff.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs. Opinion by Cooke,

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Ch.J. Concur: Jasen, Gabrielli, Jones, Wachtler and Fuchsberg, JJ.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Albany County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ Joseph W. Bellacosa
Joseph W. Bellacosa, *Clerk of the Court*

Court of Appeals, Clerk's Office, Albany, May 1, 1979.

Appendix E

Opinion of Public Service Commission of the State of New York, February 25, 1977

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Statement of Policy
on Advertising and Promotional
Practices of Public Utilities

Issued: February 25, 1977

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STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

COMMISSIONERS:

Alfred E. Kahn, Chairman, concurring in part and dissenting in part
Edward Berlin, Deputy Chairman
Carmel Carrington Marr
Harold A. Jerry, Jr.
Anne F. Mead, dissenting in part
Charles A. Zielinski

STATEMENT OF POLICY
ON ADVERTISING AND PROMOTIONAL
PRACTICES OF PUBLIC UTILITIES

(Issued February 25, 1977)

BY THE COMMISSION:

On July 28, 1976, we issued a notice of proposed policy statement and requested comments on the subjects of advertising by utilities and the promotion of electricity sales. We indicated our intention to reexamine subjects covered in our 1972 policy statement on these matters[1] in light of contemporary conditions. We asked interested parties to comment on the items discussed in the proposed policy statement and to offer alternative suggestions on these issues if they so desired.

Over 300 responses to our notice were received. Many of these were brief statements of position from individual consumers; others, including those from most of the util-

[1] *Statement of Policy on Advertising and Promotional Practices by Public Utilities*, 12 NY PSC 108-R (issued June 21, 1972).

ities, consumer, environmental and other special interest groups, were more comprehensive in scope. Because of the great number of responses, no attempt will be made in our discussion to identify the particular views of individual respondents. It is worthy of special mention, however, that we found the responses extremely valuable. They were all carefully considered and evaluated in reaching decisions on the issues presented in our notice.

Although the amount of money spent on advertising by major utilities in this State is a very small portion of their total revenues, the proper extent and content of such advertising and the ultimate responsibility for its cost is an increasingly controversial issue. This Commission has routinely monitored the advertising practices of New York utilities within the framework of the Uniform System of Accounts and the guidelines for rate treatment of these expenditures set forth in our 1972 policy statement, as subsequently amended in individual rate proceedings. Thus, we have established a system of regulation which has provided reasonable assurance that even the minor amounts expended are properly accounted for, so that we can determine whether utility rates reflect only reasonable amounts, expended for proper purposes.

Our 1972 policy statement was issued at a time when the telephone industry was beset with significant service problems, since largely overcome, when the emerging gas supply shortage was first recognized and, of perhaps greatest importance, before the 1973 oil embargo which resulted in severe fuel oil shortages and sharply increased oil costs. While we have, through individual rate and other orders, amended the provisions of the 1972 policy statement where necessary to meet these changing conditions, we have during the past year felt it desirable to have a fresh look, in integrated fashion, at the totality of issues associated with utility company advertising and promotional practices, in the light of circumstances of 1976 and 1977.

Advertising expenses may be subdivided into two broad categories: promotional—advertising intended to stimulate the purchase of utility services—and institutional and informational, a broad category inclusive of all advertising not clearly intended to promote sales.

Promotional Advertising[1]

(1) *Electricity*

The 1972 policy statement contained no restriction on the promotional advertising of electric utilities, explicitly recognizing that those companies had exercised self-restraint in these efforts, most of which were limited to development of off-peak loads. Shortly after the oil embargo, and in response to the reductions in oil supplies, we prohibited the promotion of the use of electricity through advertising or the provision of subsidy and incentive plans. That ban is still in force.

In our July 28, 1976 notice, we requested comments on a proposal to lift the flat ban against sales promotion by electric companies. We listed several competing considerations, some arguing for extension of the ban and others for its relaxation.

Of the responses received on this specific matter, a large number of parties suggested that electric companies be permitted to develop off-peak loads. In addition to the

[1] In addition to establishing the policy set forth below, we will require strict adherence to the accounting classifications of this type of advertising as set forth in the Uniform System of Accounts prescribed for electric, gas and telephone utilities. See Resolution of the Commission: Amendment of 16 NYCRR, Chapters II, III and VI, Article 1, adopted October 24, 1973.

benefits of a limited relaxation that were mentioned in our notice, many of these parties pointed out that development of off-peak load would likely result in a lowering of the unit cost of electricity, due to a greater utilization of existing plant, with a resulting downward pressure on, or at least a stabilization of, present rates. Others observed, as we did in our notice, that where electricity competes with oil, promotion of electricity, if generated incrementally from coal or uranium, could confer the additional benefit of making this country more independent of foreign oil supplies in those cases where oil is the primary competitive fuel.

We recognize now, as the Commission did in 1972, that development of off-peak loads may be beneficial in numerous ways. Increased off-peak generation, however, while conferring some beneficial side effects, also consumes valuable energy resources and, if it is the result of increased sales, necessarily creates incremental air pollution and thermal discharges to waterways. More important, any increase in off-peak generation from most of the major companies producing electricity in this State would not, at this time, be produced from coal or nuclear resources, but would require the use of oil-fired generating facilities. The increased requirement for fuel oil to serve the incremental off-peak load created by promotional advertising would aggravate the nation's already unacceptably high level of dependence on foreign sources of supply and would, in addition, frustrate rather than encourage conservation efforts. We realize, too, that a continued ban on promotion of off-peak electric usage may aptly be described as piecemeal conservationism since promotion of oil for use in heating or internal combustion applications is not similarly proscribed. Nevertheless, conservation of energy resources remains our highest priority. We do not consider

it inconsistent with that principle to implement programs that admittedly will be less than optimally effective, in a national context. It is reasonable to believe that a continued proscription of promotion of electric sales will result in some dampening of unnecessary growth so that society's total energy requirements will be somewhat lower than they would have been had electric utilities been allowed to promote sales.

We conclude that the existing ban on promotion of electricity sales should be continued. We recognize, however, that as we move toward more and more widespread adoption of time-of-day rates, it may be highly desirable for companies to publicize those rates, and point out the various ways in which customers may take advantage of them. While this advertising may better be described as informational, we wish to make clear, in any case, that it is our desire to permit advertising of this kind, provided it has the exclusive, or at least preponderant effect of encouraging *shifts* of consumption from peak to off-peak and little or no effect of increasing aggregate sales. For these reasons, we will remain prepared to approve specific proposals by the companies for specifically described programs that meet these criteria. We shall reexamine from time to time our determination to continue, with the limited exception for publicizing time-of-day rates, the ban on promotional advertising should conditions change sufficiently to warrant such a reevaluation. Further, we shall continue to maintain surveillance of all advertising activities engaged in by electric utilities, and where deviations from the requirements of our order are found, we will take remedial action, including adjustments in rates cases, to bring about compliance.

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(2) *Gas*

Because of the then emerging and increasingly severe shortage of natural gas, on October 26, 1971,[1] we ordered all gas companies (with the exception of several small companies specially situated) to limit the attachment of new gas customers and the expansion of gas service to existing customers.[1] That order also provided:

> Effective January 1, 1972, all gas distributors subject to the restrictions imposed herein shall cease all promotional activities designed to acquire new gas customers or increase sales of gas to existing customers. Except to the extent indicated below, such prohibition shall apply to all advertising employing mass media, all bill inserts or other direct mailings to customers or others, and all calls by salesmen seeking to obtain or arrange "conversions" to gas space heating or to sell or promote the sale of gas appliances. The prohibition does not apply to:
>
> (a) Service calls to repair existing gas equipment, recommendations relating to the replacement of such equipment, and information relating to such replacement.
>
> (b) Advice directed to existing customers as to how they may achieve the best heating and safety results with respect to existing gas equipment. Use of the mass media or unselective mailings are not an acceptable means of accomplishing this objective.
>
> (c) Direct contact with existing or potential customers for the purposes of encouraging the installation of dual-fuel equipment.

[1] Case 25766, the *Gas Restriction Case*, 11 NY PSC 1257.

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> (d) Individual responses to inquiries received by a gas company without prior solicitation.

These provisions were incorporated into our 1972 Policy Statement and remain in effect. We have reexamined these requirements in light of current conditions and conclude that, for the most part, they should remain unchanged. We are, however, concerned about the exception granted in item (c) above. Because additional demand for gas can be created as a result of direct contact with potential customers for the purpose of encouraging the installation of dual-fuel equipment we will no longer consider this a permissible activity by gas utilities. Of course, the companies may continue to encourage their existing gas customers to install alternate fuel equipment. In addition, in view of the deepening gas supply shortage, and the essentiality of inducing all customers to conserve, we will no longer permit promotional activities designed to retain existing customers at previous levels of consumption, except in those limited instances where gas companies are permitted to attach new residential load to offset a decline in firm load.

All other provisions of our previous order will remain in effect, as to each gas company covered. Exceptions to this policy may be granted provided a company can clearly demonstrate that it has firm supplies of gas, for the present and near future, sufficient to permit it to engage in some limited form of promotional activity without lessening the supply of gas available to existing customers.

As long as the shortage of natural gas continues, we shall maintain close surveillance of advertising and other promotional activities of gas companies. We shall also continue to require prior submittal of the promotional

plans of gas utilities seeking to deviate in any way from our order in Case 25766 as amended here.

(3) *Telephone Companies*

On February 11, 1970, we directed New York Telephone Company to "cease all promotional advertising and all other promotional activities designed to attract additional subscribers or otherwise to increase telephone usage until such time as the company's capacity to provide service exceeds busy-hour requirements throughout the state, except for local promotions in areas where ample capacity exists." Case 25290, *New York Telephone Company Service Case,* First Interim Order, 10 NY PSC 93. Since adoption of this order, New York Telephone Company's capacity to provide service has improved to the point where it now exceeds busy-hour requirements throughout the state. By order issued in Case 25290 on March 13, 1973, 13 NY PSC 461, we relaxed the promotional advertising restrictions previously imposed "provided that the company will insure that the service sought to be promoted will not burden the subscriber body with an increase in average costs, but rather will tend to reduce the burden of cost which must be supported by the average subscriber."

While the interim order in Case 25290 was outstanding, we considered whether the promotion of yellow pages should also be restricted and we concluded that it should not. Yellow pages promotion may increase telephone usage to some extent, but the major purpose of these directories is to facilitate more efficient use of the telephone by reducing calls to information or to parties unable to assist the caller.

We shall continue the policy on telephone promotional advertising that is now in effect. Promotional advertising by New York Telephone Company, or by other telephone companies, including radio-telephone utilities, will be carefully scrutinized to assure (1) that adequate capacity exists to provide the service sought to be promoted without adversely affecting existing subscribers; and (2) that the advertising expenditures themselves together with the expansion of the service which they seek to promote will tend to reduce rates for telephone service.

Institutional Advertising

In addition to seeking to promote sales, utilities (like other businesses) engage in "institutional advertising"—a rather amorphous phrase covering all advertising which is not sales promotional in nature. Although our staff has employed some relatively useful tests in reviewing expenditures for this kind of advertising,[1] the very imprecision of the definition has caused substantial controversy in our proceedings about whether certain kinds should be recovered in rates. Therefore, we believe there is a clear need to reexamine this area, and to establish a policy for treatment of related expenses in rate cases. We consider separately two categories of institutional advertising: (1) civic, political and related advertising activities, and (2) informational and other institutional advertising.

Civic, Political and Related Advertising Activities

It is generally accepted that advertising which states a utility's position on a matter of public controversy necessarily reflects the political views or self-interest of man-

[1] *E.g.*, "Is the advertising clearly beneficial to consumers?"

agements or shareholders and should not be borne by ratepayers, whose views or interests may differ. Thus, political advertising—in support of, or opposed to, governmental action of any kind—will not be considered a legitimate cost of doing business for the purpose of determining rates. See *Complaint of Grassroots Action, Incorporated*, Case 26315, April 18, 1973, 13 NY PSC 630. Our amended Uniform System of Accounts reflects this view. All political advertising is required to be recorded below the line in nonoperating expense account No. 426.4. Expenditures recorded in this account are routinely excluded in the ratemaking process.

Our decisions in two recent cases notwithstanding,[1] we shall also include in the category of political and related activities, and therefore payable by stockholders, all advertising which seeks to sway opinion—legislative, environmental, governmental, consumer or any other kind—to the industry's position on public policy disputes. Utilities, of course, have the right to publish their thoughts on vital issues concerning their operations, but, upon consideration of the comments received in response to our notice, we are now persuaded that it is unfair to impose the cost of disseminating those thoughts onto ratepayers who may or may not agree with them. The expression of a utility's views on a controversial issue may truly reflect its concern for the welfare of its consumers and may make a genuine contribution to a public policy debate; but we believe that it is basically unfair to assess against ratepayers the cost of advertisements urging the adoption of positions with which they may disagree. Therefore, we will no longer

[1] Case 26848, *Rochester Gas & Electric Corporation* (Opinion 76-8, issued April 8, 1976) and Case 26887, *Long Island Lighting Company* (Opinion 76-11, issued May 28, 1976).

sanction the use of sums provided by ratepayers to advance one side of a public controversy. We include in this category expenses incurred in the preparation of materials designed to influence public opinion in the current debate concerning the development of nuclear power. We do not seek by this action to inhibit or discourage participation by utilities in public debates of issues that vitally concern them: we recognize and endorse their right to do so. We simply believe that it is wrong to expect ratepayers to finance that participation.

Further, we shall not permit advertising on matters of public controversy to be included in the printed material that often accompanies the mailing of consumer bills. We believe that using bill inserts to proclaim a utility's viewpoint on controversial issues (even when the stockholder pays for it in full) is tantamount to taking advantage of a captive audience, since the consumer cannot avoid receiving the literature with the utility's message. Regardless of whether consumers read the material, it is basically unfair to subject ratepayers who disagree with the utility's viewpoint to the arguments of the utility through its billing mechanism. A utility company's mailing list provides an available conduit for the easy dissemination of information, which should be used for the benefit of both the consumer and the company to convey noncontroversial and useful information that will create a better informed public. It should not become a vehicle for dissemination only of the company's views on controversial matters of public policy. Accordingly, we will not permit bill inserts to be used by utility companies for the purpose of advertising their opinions or viewpoints on controversial issues of public policy.

Informational and Other Institutional Advertising

Some forms of utility institutional advertising clearly are in the public interest and their costs are a legitimate expense of doing business. These include appeals for the conservation of gas or electricity; notification of emergency conditions and procedures; instructions in the proper use of the equipment which makes use of the utility's service; information about new rates, new billing practices, or new inspection or meter reading schedules; advice concerning hazards associated with the utility's service; reports on matters of interest to the public concerning the utility's service—such as service difficulties and progress in overcoming them, projections of new capacity additions, plans for new or improved means of providing service, and the like. Expenses incurred by utilities for this type of advertising are clearly properly recoverable in rates.[1]

There is, in addition to purely informational, a large middle ground of institutional advertising that falls somewhere between that clearly beneficial to customers, and that which is clearly political or controversial. There is advertising, for example, in which a company defends, justifies, or even merely explains and describes its activities. It might be argued, on the one hand, that there is no reason for ratepayers to bear the costs of such self-justification; that it is not of direct usefulness to them. On the

[1] In addition to purely informational advertising, those advertising costs attributable to a utility's effort to upgrade the residential and industrial potential of its franchised territory and to improve the area's overall economic condition are properly recoverable. Advertisements extolling the desirability of the area as a location for job-creating industry would, if successful, benefit all of the utility's customers. Whatever its possible effects on utility rates, its benefits for the economy of New York State clearly makes such advertising a fully acceptable activity by utility companies.

other hand, it is extremely difficult to argue, especially now when public utilities are subjected to frequent public attack and criticism, that these are not, within limits, legitimate and indeed inescapable costs of doing business in today's conditions. It is unreasonable not to afford utility managements under attack an opportunity to explain and justify themselves. It might be argued, of course, that since such expenditures are on behalf of the companies rather than in the direct service of their ratepayers, they ought to be paid for by the shareholders. But if they *are* inescapable costs of doing business, and if, as is our policy, we allow shareholders returns only at the minimum level necessary to attract capital, then at least in principle if we were nominally to disallow these expenditures from rates, we would have to provide a correspondingly larger return on equity.

Our experience demonstrates that the time spent by our staff in ferreting through innumerable vouchers of institutional advertising is far out of proportion to the dollar amount of expenses found in that process to be unacceptable for rate purposes. For example, in the year 1975, *all* advertising costs spent by the seven largest privately owned electric, gas and steam utilities in New York State amounted to $3,370,000. Since the utilities received $5,280,264,000 in revenues for that year, the advertising costs equated to 6/100 of 1% of those revenues: six cents on *all* forms of advertising for every $100 in revenues received. It follows that since institutional advertising of a questionable nature is only a part—and typically a very small part—of total advertising, its impact on rates would be very slight indeed. It is obvious that any benefits gained from close, individual examination of these insignificant costs must be outweighed by the costs of their examination.

It is for these reasons that we have decided to allow companies a very small pool of dollars in rates to cover both informational and the intermediate category of "other institutional" advertising. On the basis of past practice, this allowance will, in all probability, range between 1/10 and 1/25 of one percent of operating revenues, in inverse relationship to the size of the companies. It will be determined individually for each company, in its next or pending rate case,[1] on the basis of various other factors including size, geographical location, number of customers and costs of doing business in the area. Adoption of this modest lump sum advertising allowance approach will end the vexing and essentially arbitrary process our staff now engages in of reviewing all informational and other institutional advertising to decide whether specific expenses should be allowed or disallowed in setting utility rates.

This plan will obviously not solve all the problems we have described: we will still have to determine which advertisements are clearly political and/or self-serving, and specifically disallowed: and parties in rates cases would still be free to question the propriety of the lump sum allowance for the informational and other institutional advertising categories. On the other hand, it has the virtue of recognizing that some modest institutional expenditures, over and above those purely informational in nature, are an inescapable and legitimate cost of doing business, and get the Public Service Commission out of the business of an item-by-item content examination and evaluation of past advertisements—an activity in a sense redundant anyhow, in view of the fact that all we really do is set a reasonable level of rates for the future.

[1] In pending cases where the hearings have been completed, parties may present their views on a proper lump sum institutional advertising allowance on brief.

Our staff will maintain close and continuing scrutiny over the level of the lump sum advertising allowance for each company to assure that the amount provided is sufficient to cover only reasonable and necessary advertising costs consistent with this policy statement. We expect to review the policies set forth here periodically and to revise them when it seems desirable to reflect new or changed circumstances.

In the area of developing better public relations and avoiding obvious areas of customer dissatisfaction, utility managements are urged to give serious consideration to the clear labeling of the institutional advertising that will not be recorded as a cost of doing business for rate purposes. It is not in the interest of anyone to have institutional advertising exacerbate customer resentments at a time when large rates increases are made necessary by increases in various classes of costs beyond the control of utility management. Expenditures for institutional advertising *are* subject to management control and utility managements would be well advised, if the advertisement is either political or of a type not providing useful information to customers, to state in the advertisement itself: "The costs of this message are being borne by the company's stockholders and the expense will be excluded from consideration in any proceeding concerned with fixing the company's rates."

ALFRED E. KAHN, Chairman, concurring in part and dissenting in part:

I am for the most part in agreement with the conclusions we reach in this decision and the supporting argument, having participated actively in their formulation. At the same time, my views about our proper role in regulating

the advertising policies of utility companies are sufficiently distinctive from those of my fellow commissioners to make me want to set them forth in my own words and over my own signature.

I begin by saying, in different words, what our opinion says: namely, that the many hours that we, our staff, the regulated companies and various intervenors devote to utility company advertising policies, and to deciding what portion of such expenditures are properly recovered in rates, are by any reasonable test a waste of time and ratepayers' money. These efforts must surely have the lowest benefit/cost ratio of any in which we engage; and the time inescapably devoted to them by our staff and commissioners would almost certainly have a much larger pay-back to ratepayers if it could be devoted to other endeavors—such as the further scrutiny of management efficiency, the formulation of more efficient rate structures, more intensive pressures on the companies we regulate to engage in load management and to encourage conservation. The heated discussions about advertising policy are, in other words, a tempest in a teapot, considering, first, the very, very small number of dollars at stake, and, second, the essential fraudulence of our purporting to exclude from rates expenditures for advertising that company managements will continue to feel it necessary to make: since we make every effort to set the allowable return on equity at the minimum cost of capital, and most of the companies we regulate are not earning even that, in principle putting any advertising expenditures "below the line" can only mean, if we are honest, increasing the allowed return on equity, in order to enable these companies to raise the capital they need on reasonable terms.

For these reasons, I am particularly enthusiastic about our decision to provide companies with a very, very modest lump-sum allowance for institutional advertising. It is a first step in the direction of sanity, offering the hope of cutting down on the endless hours our staff has to devote to scrutinizing individual advertisements, then deciding and litigating whether they are properly includable in test-year expenses for rate-making purposes.

At the same time, there are many things we do and must do that cannot be said to pay off on a pure dollar and cents basis. If it infuriates some consumers to see some of their dollars—even if for each of them it means only a penny a year—spent to extol the benefits of nuclear power, or to induce them to purchase additional electricity or gas, or to make greater use of the communications facilities provided them by franchised monopolists, we must confront the question of principle, of whether we should be condoning this kind of use of ratepayers' dollars, even if the confrontation costs ratepayers more dollars than the companies spend in these questionable ways.

If it comes to questions of principle, however, there are more principles at stake than the Commission seems willing to recognize in its decision today, and it is these that I take the occasion of this partial concurrence and partial dissent to spell out.

Promotional advertising by electric companies

It is only with the greatest reluctance and distaste that I join my colleagues in continuing our absolute prohibition of promotional expenditures by electric companies. While, as a non-lawyer, it has never been clear to me why the protections of the Fourteenth Amendment, which as a

matter of historical fact was enacted to protect the rights of real, biological *people,* should necessarily have been extended to state-created artificial entities like corporations, I also believe in competition as a form of economic organization, wherever it is feasible. And for competition to be effective, some sales promotion is necessary. Even if that were not so as a general matter, it would in my judgment be inescapably so when there compete in the market two rivals, one of whom is free to advertise his wares and the other is—under our present policies—not.

The issue of whether electric companies should be permitted to advertise (observe that the question before us is not whether those expenditures should be recovered in rates, but one, rather, of our totally prohibiting such activities) arises almost exclusively in the context of summer-peaking electric companies wanting to be permitted to promote electric space heating, which is for them essentially an off-peak use of power, with their principal rivals, the distributors of *heating oil,* vociferously importuning the Public Service Commission and the Legislature to prevent them from doing so. An idea is not necessarily a bad one merely because it is propounded by a scoundrel, or—as in this case—a businessman who wants to be relieved of the burdens of competition. But it has always been a source of wonder to me how self-styled protectors of the consumer interest could have so readily allied themselves —to such a point that in some cases the distinction between them disappears entirely—with people who seek the assistance of government in suppressing competition.

There are considerations in this case, however, that induce me to go along with continued prohibition, however queasily.

1. The first is grounded in a combination of facts: first, that for apparently all of the summer-peaking electric companies in the state, marginal generating capacity off-peak as well as on is oil-fired, and promises to continue to be for several years; and that the use of such capacity to provide electricity for resistance heating, because of the fact that it takes something like three btu's of oil to generate the equivalent of one btu of electric energy, is simply far less efficient in energy terms and uses more oil in total than direct combustion of the oil for space heating purposes. (I must point out, however, that the three for one comparison grossly exaggerates the relative inefficiency of electric resistance heating, because it fails to take into account the energy costs of delivery of oil to the various points of consumption; the far less than 100% efficiency with which oil is typically burned in furnaces; the lesser injury to the environment from combustion of oil in electricity generation than, alternatively, in thousands of separate furnaces; and the promise of the heat pump of sharply increasing the efficiency of the use of electricity for heating. But electric space heating still seems to use more oil, typically; and it is a matter of utmost urgency to reduce the dependence of our economy on imported oil, which must supply the growing difference between what we are capable of producing at home and what we consume.)

On the other hand, I find myself in basic disagreement with the popular simplistic view that electric resistance space heating should simply be banned because it is "less energy efficient." I do not accept an exclusively energy standard of value. There are many pertinent costs and benefits besides the direct use of energy to be taken into account in making intelligent economic choices—the rela-

tive costs of labor, of capital installations of heating equipment (which also indirectly use energy), the relative comfort and convenience of alternative methods of satisfying needs, the use of other scarce materials, and the damage to the environment. The only sensible common denominator for these various costs is the dollar: provided there are no major distortions in the price tags placed on these various elements of cost, it is the total dollar costs, not just the btu's that should be compared.

Moreover, I do not believe it is the proper function of a public utility regulator to tell people that they cannot have things for which they are willing to pay the price. It is our responsibility to see that prices reflect costs—all relevant social costs; it is our responsibility also to persuade and educate consumers to make intelligent choices. But I do not conceive it as our responsibility to tell people that they may not have something for whose total marginal social costs they are willing to pay: regulators are all too prone to substitute their judgments of what is good for people for the judgments of the people themselves.

For these reasons, it is only with the greatest reluctance that I go along with a policy that denies one competitor the right to advertise his wares, while leaving another free to do so, because we do not think customers should be encouraged to use electric resistance heating.

2. I do so, additionally, because the most promising mechanism for offsetting the relative inefficiency of converting fossil fuels into electricity is the heat pump; but installation of a heat pump means also installation of central air conditioning. To this extent, then, the promotion of off-peak electric space heating involves, in effect, the promotion also of on-peak summer air conditioning.

Once again, my espousal of free consumer choice as a general principle would require me to regard such a development with equanimity—were it not for the fact that the price of electricity to most consumers in the state does not fully reflect the apparently much higher marginal social costs of on-peak consumption in summer peaking markets. Until each consumer individually confronts a marginal cost-based, time-of-consumption rate, consumption on peak, with its large marginal use of oil-fired generation, is artificially subsidized.

If, then, the uncontrolled promotion of electric heating means the installation of heat pumps, which mean, in turn, more central air conditioning, the use of which is not charged its full marginal costs, the result is inefficient subsidization of consumption on peak, and higher rates for all consumers.

3. There are, of course, some electric companies in the state whose peaks fall in the winter rather than in the summer. It would seem that these might be permitted to promote, at least where there is a reasonable basis for believing the effect will be to stimulate sales off peak, improve their load factors, and therefore benefit all customers (provided the rates for the promoted service cover long-run incremental costs). But until we have ascertained in our generic electric rate proceeding (C.26806) whether the proper costing entity for marginal cost-based time-of-day rates is the individual company or the state system as a whole, such a relaxation of our ban opens up the possibility that, by permiting upstate, winter-peaking companies to promote summer air conditioning, we may in effect be encouraging a greater expansion of capacity for the State as a whole, which is summer peaking, than would other-

wise be desirable. To put it another way, if the proper costing entity is the State rather than the individual company, the marginal costs of summer sales may be much higher than of winter sales even in winter-peaking markets. Until we have resolved these costing questions, there is a danger that permitting individual companies to promote sales off their own individual peaks will in effect involve uneconomic subsidization of those sales.

I do not regard flat prohibitions of promotion by public utility companies abhorrent as a matter of principle. Where a company enjoys something close to monopoly, conferred upon it by public franchise, it does not in my judgment have an unfettered right to advertise. This is particularly so because merely disallowing such expenditures in setting rates, under the glib assumption that these costs will then be borne by stockholders rather than ratepayers, is something of a sham, for reasons I have already set forth.

Nuclear advertising

This last observation applies with particular force to the Commission's decision here to disallow the costs of advertisements publicizing company management views in favor of nuclear power. If electric company executives continue to feel that nuclear energy is in the best interest of their ratepayers, they are likely to continue to feel a responsibility for publicizing that fact. (And, for reasons we have already set forth in our Rochester Gas & Electric and Long Island Lighting Company decisions on this subject, decisions that the Commission majority reverses today, I would not wish them to refrain.) Since we set our allowance for return on equity at something close to the minimum cost of capital, and most companies in the

state are in any event earning something short of that amount, any continuation of such "disallowed" expenditures by utility company managements would in principle require us to raise the return on equity allowance correspondingly. In these circumstances, telling companies to put certain expenditures "below the line" comes out either to telling them to stop making the expenditures entirely, or is essentially cosmetic—and a trifle insincere.

I would have been happy to go along with the resolution of this dilemma proposed by Commissioner Berlin to the RG&E and LILCO cases—namely that utility companies be required to provide equal support for the presentation of opposing viewpoints. A reading of the responses to our call for comments on this subject persuades me, however, that his proposed requirement would expose us to endless litigation; I reluctantly conclude that its administration would be simply impractical.

In these circumstances, my own preference would be to extend the modest lump-sum allowance we have decided to provide for *institutional* advertising to cover discussions of general public policy issues such as the desirability of nuclear power as well. The logic, I suggest, is the same: company managements are likely to feel a continued obligation to present their views on the merits of nuclear energy; they are likely to feel that this is in the interest of their ratepayers, possibly more than their stockholders (who hardly benefit when companies must sell stock below book value in order to finance these extremely costly plants); and I would be inclined to agree.

Following this same reasoning, I repeat my extreme satisfaction at the Commission's resolution of the issue of institutional advertising. Our decision here is both sensible and non-ideological. We decline to cater to the vulgar

view, often demagogically expressed, that public utility companies have no right to communicate with their customers, or to answer the often unjust criticisms to which they are subjected, and that if they wish to do so, the expenditures should be placed "below the line"—an expedient that is in my judgment something of a sham.

ANNE F. MEAD, Commissioner, dissenting in part:

I concur, with one exception, in the statement of policy issued this day on advertising and promotional practices of public utilities.

The one exception is the area of institutional advertising which is designed to create, enhance or sustain the corporate image of the utility or which indulges in self-congratulation or self-admiration of the utility or its accomplishments. In my opinion these advertisements should not be allowed as an operating expense in any rate schedule proceeding or for rate making purposes.

The institutional advertising which I describe above is not in my opinion a necessary or proper expense in providing utility service. At a time when utility rates are increasing beyond the ability of many to pay, any expense, no matter how small, that is not necessary or beneficial to the consumer should not be allowed for ratemaking purposes.

Appendix F

Order of the Public Service Commission of the State of New York, February 25, 1977

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on February 17, 1977.

COMMISSIONERS PRESENT:

Alfred E. Kahn, Chairman[1]
Edward Berlin, Deputy Chairman
Carmel Carrington Marr
Harold A. Jerry, Jr.
Anne F. Mead[1]
Charles A. Zielinski

Notice of Proposed Policy Statement and Request for Comments on Advertising by Public Utilities and Electric Promotion Practices.

ORDER IMPLEMENTING CERTAIN RESTRICTIONS ON UTILITY ADVERTISING

(Issued February 25, 1977)

BY THE COMMISSION:

In our Policy Statement on Utility Advertising issued this date, we stated that certain changes should be made in existing orders on that subject. The purpose of this Order is to place those changes into effect. The Statement of Policy contains a full explanation of these changes and our reasons for adopting them.

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[1] Chairman Kahn and Commissioner Mead filed separate statements dissenting in part to the Statement of Policy which this Order implements. Their statements are appended to the Statement of Policy issued this date.

Appendix F

With respect to advertising by gas utilities, we will order those companies to discontinue direct contact with *potential* customers for the purpose of encouraging installation of dual-fuel equipment.[1] Further, we shall direct gas utilities to discontinue promotional activities designed to retain existing customers at previous levels of consumption, except in those limited instances where gas companies are permitted to attach new residential load to offset a decline in firm load.

In addition, we shall, for the reasons set forth in the Statement of Policy, order all utilities to discontinue the practice of utilizing bill inserts as a mechanism for the dissemination of a utility's position on controversial matters of public policy.

The Commission orders:

1. All gas companies shall: (a) discontinue direct contact with potential customers for purposes of encouraging installation of dual-fuel equipment, and (b) discontinue promotional activities designed to retain existing customers at previous levels of consumption unless authorized to attach new residential load.

2. All utilities subject to the jurisdiction of this Commission shall discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy.

By the Commission,

(SEAL) (SIGNED) SAMUEL R. MADISON
Secretary

[1] Of course, gas companies may, and indeed are, urged to encourage *existing* gas customers to install alternate fuel equipment.

Appendix G

Order of the Public Service Commission of the State of New York Denying Petitions for Rehearing, July 14, 1977

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on July 6, 1977

COMMISSIONERS PRESENT:

Edward Berlin, Acting Chairman
Edward P. Larkin
Carmel Carrington Marr
Harold A. Jerry, Jr.
Anne F. Mead
Charles A. Zielinski

Notice of Proposed Policy Statement and Request for Comments on Advertising by Public Utilities and Electric Promotion Practices.

ORDER DENYING PETITIONS FOR REHEARING

(Issued July 14, 1977)

BY THE COMMISSION:

On February 25, 1977, we issued our Policy Statement on Utility Advertising announcing certain changes in our treatment of this subject. Specifically, we stated: (1) that gas utilities should discontinue direct contact with potential customers for the purpose of encouraging installation of dual-fuel equipment and (2) that all utilities should discontinue the practice of using bill inserts as a mechanism

for the dissemination of a utility's position on controversial matters of public policy. By Order issued the same day, these changes were put into effect.

Petitions for rehearing have been received from the Consumer Protection Board (CPB), Central Hudson Gas & Electric Corporation, Columbia Gas of New York, Inc., Consolidated Edison Company of New York, Inc., Niagara Mohawk Power Corporation, New York Telephone Company, New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation. Replies to exceptions have been filed by the CPB and the Natural Resources Defense Council, Inc., *et al.*

PROMOTIONAL ADVERTISING

Central Hudson excepts to our decision to continue the existing prohibition of promotional advertising by both electric and gas companies. The utility contends that under *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), commercial speech is protected by the guarantees of the Bill of Rights and, therefore, our restriction on promotional advertising is void. This case involved a Virginia statute which provided that a pharmacist is guilty of unprofessional conduct if he advertised the price of any prescription drug. There is no contention here that commercial speech falls outside the scope of the First Amendment. But this does not mean that commercial speech may never be regulated.

In *Virginia State Board of Pharmacy*, the Court could find no legitimate State interest in restricting the dissemination of pricing information to the public. A much different situation exists here. The rates of electric utilities in this State continue to rise. The need for such increases

derives in substantial part from pressures for increasing plant capacity to meeting growing demand. While some progress is being made to price electricity to meet its marginal cost, it is clear that the rates charged today do not cover the marginal costs of new capacity. In these circumstances, promotion of electric usage by electric utilities will simply exacerbate the pressure for spiraling prices. Moreover, when national policy requires energy conservation, the promotion of electricity by regulated public utilities provides totally misleading signals that conservation is unnecessary. This is especially true since the utilities in this State are expected to promote conservation by their customers.

While promotion of off-peak usage, particularly electric space heating, is touted by some as desirable because it might increase off-peak usage and thereby improve a summer-peaking company's load factor, we are convinced that off-peak promotion, especially in the context of imperfectly structured electric rates, is inconsistent with the public interest,[1] even if it could be divorced in the public mind from promoting electric usage generally. As we pointed out in our Policy Statement, increases in generation, even off-peak generation, at this time, requires the burning of scarce oil resources.[2] This increased requirement for fuel oil aggravates the nation's already high level of dependence on foreign sources of supply.

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[1] Advertisements encouraging installation of heating equipment will frequently occur during the summer periods when air-conditioning usage is at its peak and when requests for conservation are being made.

[2] We distinguish here between promotional advertising designed to shift existing consumption from peak to off-peak hours and advertising designed to promote additional consumption during off-peak hours. It is the latter that we proscribe here.

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An additional area of legitimate State interest was pointed out by Chairman Kahn in his separate statement. The uncontrolled promotion of electric heating most likely means the installation of heat pumps, since they are the most promising mechanism for offsetting the relative inefficiency of converting fossil fuels into electricity; but installation of a heat pump means also installation of central air-conditioning. To this extent, promotion of off-peak electric space heating involves promotion of on-peak summer air-conditioning as well as on-peak usage of electricity for water heating. And the price of electricity to most consumers in the State does not now fully reflect the much higher marginal costs of on-peak consumption in summer peaking markets. In these circumstances, there would be a subsidization of consumption on-peak, and consequently, higher rates for all consumers. The promotion of electric consumption at rates that do not reflect the costs of it to society is not the kind of commercial speech contemplated by *Virginia Board of Pharmacy*.

Our Statement recognized, however, that some companies have peaks occurring in the winter. To the extent rates cover long-run incremental costs for those companies, there is reason to believe that the promotion of off-peak sales may improve their load factors and benefit their customers. But, as former Chairman Kahn pointed out, before we know that this actually is the case, we must first ascertain whether the proper costing entity for marginal cost-based time-of-day rates is the individual company or the State system as a whole,[1] since if we allow winter-peaking companies to promote summer air-conditioning, we may be encouraging a greater expansion of capacity for the entire

[1] This question is at issue in Case 26806 (Generic Electric Rate Proceeding). A decision is expected presently.

Appendix G

State, which as a whole is summer-peaking, than would be necessary or desirable.[1]

It is clear, therefore, that there are ample grounds here for regulation of commercial speech. Manufacturers and dealers, whom we do not regulate, remain free to promote the use of electric equipment and appliances. Such advertising will not provide the same misleading signals to the public and at the same time will provide a means for the public to be advised of the available alternatives.

Columbia Gas specifically objects to our decision to extend the ban on promotional activities by gas utilities to include direct contact with potential customers for the purpose of encouraging installation of dual-fuel equipment. Columbia Gas argues that this additional restriction is unnecessary since the Commission now exercises total control over the expansion of its market. Under existing restrictions it cannot take on new customers and it must inform potential customers that it has no gas available for their use. Our new restriction, the company argues, denies it the possibility of obtaining new business if, and when, the natural gas supply situation improves and the company is authorized to take on new customers.

The specific purpose of our Order was to reduce the demand for gas. It would be inconsistent with this aim to permit a gas utility to promote the attachment of potential customers. In accordance with our past policy, however, we are prepared to modify, or even remove, this restriction upon a clear showing that the company has firm supplies of gas sufficient for it to engage in some limited pro-

[1] Expressed another way, if the proper costing entity is the State rather than the individual company, the marginal costs of summer sales may be much higher than of winter sales even for winter-peaking markets.

motional activity without lessening the supply of gas available to existing customers.

Political Advertising

Central Hudson also argues that our prohibition on the recovery through rates of expenditures for political advertising somehow violates its Constitutional rights. To support this claim, the company relies on *West Ohio Gas Co.* v. *Public Utilities Comm'n*, 294 U.S. 64 (1934) and *Virginia State Board of Pharmacy, supra.* Both cases, however, are inapposite. First, unlike the *Virginia* case, we are not prohibiting the company from expressing its position on matters of public controversy. We are simply not permitting a utility to pass along to its ratepayers the costs involved in publicizing its political views. *West Ohio* stands for the proposition that advertising is a legitimate business expense and, therefore, a reasonable allowance should be provided for this activity. It does not require a dollar-for-dollar reimbursement to the company for any and all expenses incurred.

Bill Inserts

Every utility filing a petition has alleged that our decision to prohibit the use of bill inserts to publicize its views on matters of public controversy violates the First Amendment and, in addition, is too vague. We reject these contentions.

First we think it pertinent that our prohibition in no way attempts to prohibit the companies from making their views known. But use of the bill insert for this purpose is, in our judgment, improper since it gives a utility a unique and undue advantage in publicizing its position. The utility's billing records make available a selectively

chosen target audience. Any material that is enclosed with a bill will be received by the customer since he has no alternative but to pay the bill if he desires continuation of his utility service. While it is up to the customer whether to read the matter contained in bill inserts, utility management obviously has a unique vehicle for getting its material into its customers' hands.

If the bill insert is turned into a mechanism to promote the management's views on controversial issues, the unique advantage of the billing mechanism is then transformed into a device for presenting only one side of this issue. We believe that this confers an unreasonable advantage on management that unduly discriminates against others who may not share or who oppose the company's views. Our previously announced ban on controversial material in bill inserts is to preserve the insert for matters that are not merely presentations by partisans on one side of a debate but which contain useful information on topics that are not controversial. In addition to the undue advantage conferred on management, there are several other factors that we also consider important.

The bill insert is not only a unique medium of communications, it is also quite limited: (1) the size and weight of the insert, in principle, should be such that it will fit in an envelope with the bill without increasing the weight of the total package so much as to require additional postage costs; and (2) an insert can be used only so often as a bill is sent by the utility company, usually once a month, but in many cases only once every other month. These limitations mean that utility companies could easily use up much of the scarce resource of bill insert communication by soliciting support for the industry's position on controversial public issues. Bill inserts can, and, in our view, should

be used primarily to convey information that is clearly helpful to consumers, such as practical steps that individuals can take to conserve energy. Our prohibition assures preservation of the latter public interest objective.

Since utilities have monopoly franchises conferred by the government, no other person or entity can provide utility service and thereby gain the wide, captive audience for bill inserts enjoyed by them. This makes the utility bill insert medium analogous to the limited radio spectrum, whose use is properly regulated by the government (specifically the Federal Communications Commission), to assure that those who are given the privilege to use limited spectrum space for the operation of radio and television stations act as trustees of the public interest.

Broadcasters, of course, are not precluded from airing their opinions. Indeed, they are encouraged to do so. But, they are required, by the FCC's "fairness doctrine" to present contrasting views on controversial public policy issues, because there simply is not enough spectrum space available to allow everyone with a unique point of view to operate a radio or television station. Since the same limitation is pertinent to utility bill inserts, we considered imposing something like a "fairness" or "equal time" requirement on the companies: if a utility stated its position on a controversial issue in a bill insert, it would have to give an organization with an opposing viewpoint a chance to disseminate its opinion as an insert with the utility's bill. While some of us preferred this approach, we were all convinced ultimately that it would be difficult to administer fairly,[1] and would tend to lessen undesirably the number of bill inserts dealing directly with such useful

[1] We note that no utility company has submitted to us a proposal for handling controversial issues in bill inserts in this manner.

and uncontroversial information as consumer conservation measures.

It is for these basic reasons that we adopted our ruling. And it does not contravene the utilities' rights of free speech or press. Utility bill inserts are not newspapers which, in principle, any person is free to publish and thereby make his opinions known to the public. The privilege to disseminate utility bill inserts derives from the privilege of franchised monopoly, conferred by the government. It can, therefore, be regulated by the government to assure that it is exercised in the public interest.

We have not, of course, prohibited the utilities from expressing their corporate opinions on controversial public policy issues in any other media. They are free, like all other members of our society, to explain their positions on radio and television interviews, to seek to purchase space in newspapers, and to speak before public gatherings. For these kinds of communications, we merely require that the companies, rather than their customers, bear the costs.

The goal of free speech and of a free press is a well-informed electorate capable of making sound pubic policy decisions. Our ruling does not diminish to any substantial degree the utitities' ability to contribute to that goal. It does, however, preclude their monopolizing the unique utility bill insert medium.[1]

[1] We note also that where the ratepayer's bill is accompanied by political advertisement, the political material is, absent allocation, getting a free ride; the utility is deriving the economic benefit of postage, envelope, labor and overhead involved in the billing process. And even if an allocation of the expenses could be made, the actual cost of enclosing such material in the bill itself does not approach the one-sided benefit to the management of being able to use the unique billing process in presenting its side of the controversy. It is certainly questionable whether ratepayers should be compelled to support views with which they do not agree. See *Abood* v. *District Board of Education,* 45 U.S.L.W. 4473 (1977).

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The petitioners also argue that the term "controversial issues of public policy" is too vague and does not give them any clear standards by which to judge the content of their bill inserts.

In the Guidelines, we discussed the various types of materials that would fall within our proscription. These Guidelines are admittedly general but we expect to give them greater definition through future advisory determinations. One such determination was made in our Policy Statement where we specifically included in this category expenses incurred in the preparation of materials designed to influence opinion in the current debate concerning the development of nuclear power. In its petition here, Con Edison requested a determination as to whether materials prepared in response to the demand by several elected officials for public operation of its facilities falls within the political category. We believe that it does and therefore should not be included as a bill insert. In the event a utility wishes additional guidance with respect to this matter, it should feel free to seek it. We will resolve any request expeditiously so that no undue delay will result.

Con Edison also states that under the Constitution, the field of postal regulation has been preempted by the Federal government. Claiming that our decision on bill inserts is such an interference with the mails, the company argues, therefore, that we have acted illegally. This argument is specious. Our prohibition involves neither direct physical interference with Federal postal activities nor a direct immediate burden on the performance of postal functions. Our Order is in no way an interference with the Federal regulation of the mails. See *Railway Mail Assoc.* v. *Corsi*, 326 U.S. 88 (1945).

Appendix G

OUT-OF-STATE POLITICAL CONTRIBUTIONS

We restated in the Policy Statement our longstanding position that political advertising will not be considered a legitimate cost of doing business. Any such expenditures must be recorded below the line. See *Complaint of Grassroots Action, Inc.*, 13 NY PSC 630 (1973); *Statement of Policy on Advertising and Promotional Practices by Public Utilities*, 12 NY PSC 108-R (1972); *Accounting for Donations, Dues and Lobbying Expenditures*, 7 NY PSC 9-R (1967).

CPB is dissatisfied, however, and argues that out-of-state political contributions should be banned completely, claiming that any connection between out-of-state political actions and the New York operations of a utility is too remote.

In *Grassroots*, we considered the issue of political contributions by utilities and held that, as long as these expenditures are minor, so that they have little or no effect upon a utility's financed stability, we will give our general consent and approval as required by Section 107 of the Public Service Law for nonutility-related expenditures. We stated that to require prior approval for each expenditure before a utility could speak out in the public forum on matters which could affect it would be undesirable. We see no reason to depart from this general policy even when out-of-state expenditures are involved.

PERCENTAGE LIMITATION ON ADVERTISING EXPENDITURES

New York Telephone argues that our guideline limitations on institutional and informational advertising[1] would

[1] The phrase "and informational" was inadvertently omitted from the last line of footnote 1 on page 13 of our Statement. The last line of that footnote should read "institutional and informational advertising allowance on brief."

result in significant reductions in reasonable advertising expenditures. The company argues that we erred in making no distinction among the various types of advertising that fall within these broad categories. For example, legally required notices and purely informational advertising, *i.e.*, notification of emergency procedures or changes in billing practices should fall outside the scope of our guideline limitations.[1]

NYT also claims that the ceiling on advertising expenditures imposed by our Guidelines serves no useful purpose since staff must still determine whether any particular advertisement is political or self-serving. In any event, the company points out the entire lump sum allowance may still be questioned in a rate proceeding.

We recognized that our new policy would not solve all the problems relating to advertising. It is, however, an improvement over our past practice of conducting an item-by-item examination and evaluation of past advertisements—a practice which took valuable staff time, time which could be far better used checking on other, quantitatively larger expense items. What we are doing here is establishing a relatively simple procedure to determine a reasonable allowance for future institutional and informational advertising. We intend to monitor the results of this new policy and to make any modifications necessary in light of this experience. We also recognize that expenses associated with legally required advertising vary depending on the territory served by the utility. We are prepared, therefore, to take such differences into account in applying our Guidelines to individual companies.

[1] The company estimates that 1977 expenditures for informational and institutional advertising will exceed $4 million, including $600,000 for legally required notices. Under strict application of our Guidelines, only $1,635,000 would be recoverable from rates.

CONCLUSION

We have reviewed the petitions for rehearing filed in response to our *Statement of Policy on Advertising and Promotional Practices of Public Utilities* and conclude that they present no new arguments of fact or law which warrant modification of our Statement. The petitions are, therefore, denied.

The Commission orders:

1. The petitions for rehearing filed by the parties listed in the Appendix to this Order in response to our *Statement of Policy on Advertising and Promotional Practices of Public Utilities* and accompanying Order, issued February 25, 1977, are denied.

2. This proceeding is closed.

By the Commission,

(SEAL) (SIGNED) SAMUEL R. MADISON
Secretary

APPENDIX

Parties Filing Petitions for Rehearing

Central Hudson Gas & Electric Corporation
Columbia Gas of New York, Inc.
Consolidated Edison Company of New York, Inc.
New York State Electric & Gas Corporation
New York Telephone Company
Niagara Mohawk Power Corporation
Rochester Gas and Electric Corporation
Consumer Protection Board

Appendix H

Notice of Appeal to the Supreme Court of the United States, June 26, 1979

SUPREME COURT
OF THE STATE OF NEW YORK

County of Albany

Albany County Clerk's Index No. 11163-77

In the Matter of

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Petitioner,

for a judgment pursuant to Article 78 of the CPLR,

—against—

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Respondent.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Plaintiff,

—against—

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Defendant.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Consolidated Edison Company of New York, Inc., the Petitioner-Plaintiff above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York entered in the above special proceeding and action on May 1, 1979, affirming the order of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department. The order of

Appendix H

the Appellate Division reversed the judgment of the Supreme Court, Albany County, and declared constitutional an order of the Public Service Commission of the State of New York prohibiting utilities, including Petitioner-Plaintiff, from utilizing bill inserts as a means of disseminating their views on controversial matters of public policy. The judgment of the Supreme Court, Albany County, annulled, declared unconstitutional, and permanently enjoined enforcement of said order of the Public Service Commission of the State of New York.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Yours, etc.,

/s/ JOSEPH D. BLOCK
JOSEPH D. BLOCK
PETER P. GARAM
4 Irving Place
New York, New York 10003
(212) 460-2777
Attorneys for Petitioner-Plaintiff
Consolidated Edison Company of New York, Inc.

Dated and Entered:
June 26, 1979
Office of Albany
County Clerk
Albany, N. Y.

To:

Clerk of the Supreme Court, Albany County
Albany County Courthouse
Albany, New York 12207

PETER H. SCHIFF, Esq.
Counsel to the Public Service
Commission of the State
of New York
Empire State Plaza
Agency Building #3
Albany, New York 12223

Appendix H

CERTIFICATE OF SERVICE

I, Peter P. Garam, one of the attorneys for Petitioner-Plaintiff herein, hereby certify that on the 26th day of June, 1979, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on the Public Service Commission of the State of New York, Respondent-Defendant herein, by depositing same in a United States mailbox, with first class postage prepaid, addressed to Peter H. Schiff, Esq., Empire State Plaza, Agency Building #3, Albany, New York 12223, Counsel to the Public Service Commission of the State of New York.

All parties required to be served have been served.

/s/ PETER P. GARAM
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4 Irving Place
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(212) 460-2985
Attorney for Consolidated
Edison Company of New York, Inc.

Supreme Court, U. S.
FILED
AUG 20 1979
RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE IN SUPPORT OF JURISDICTIONAL STATEMENT

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August, 1979

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In the

Supreme Court of the United States

October Term, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE IN SUPPORT OF JURISDICTIONAL STATEMENT

Edison Electric Institute ("EEI") hereby submits its brief *amicus curiae* in support of the jurisdictional statement filed on July 27, 1979 ("Jurisdictional Statement") by appellant Consolidated Edison Company of New York, Inc. ("Consolidated Edison") in the captioned appeal from a judgment of the Court of Appeals of the State of New York entered in this case on May 1, 1979. In accordance with this Court's Rule 42, Edison Electric Institute has received the written consent of counsel for both parties to file this brief *amicus curiae*. Copies of the consents have been filed with the Clerk.

Opinions Below

The opinion of the Court of Appeals of the State of New York is reported at 47 N.Y.2d 94, 390 N.E.2d 749, 417 N.Y.S.2d 30 (1979), and is set forth in Appendix A to the Jurisdictional Statement at 1a-15a. The opinion of the New York Supreme Court, Appellate Division, Third Judicial Department, is reported at 63 A.D.2d 364, 407 N.Y.S.2d 735 (1978), and is set forth in Appendix B to the Jurisdictional Statement at 16a-23a. The opinion of Special Term, New York Supreme Court, Albany County, is reported at 93 Misc.2d 313, 402 N.Y.S.2d 551 (1978), and is set forth in Appendix C to the Jurisdictional Statement at 24a-28a. The opinion of the Public Service Commission of the State of New York ("the Commission") is reported at 17 NY PSC 1-R (1977), and is set forth in Appendix E to the Jurisdictional Statement at 31a-56a. The initial order of the Commission is not reported. It is set forth in Appendix F of the Jurisdictional Statement at 57a-58a. The order of the Commission on rehearing is reported at 17 NY PSC 17-R (1977), and is set forth in Appendix G of the Jurisdictional Statement at 59a-71a.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(2), the appeal drawing in question the validity of a statute of the State of New York as interpreted by the Court of Appeals of the State of New York, and the validity of an order of the Public Service Commission of the State of New York promulgated pursuant to such statute, on the ground of repugnancy to the Constitution of the United States, specifically the First and Fourteenth Amendments thereto, and the decision below having been in favor of the validity of the statute as interpreted and in favor of the validity of the order.

Questions Presented

1. Whether Section 66 subd 12-a of the Public Service Law of the State of New York, interpreted (with the force of law) to apply to the regulation of the entire utility billing process, is constitutional as interpreted when invoked to limit appellant's expressional rights guaranteed by the First and Fourteenth Amendments.

2. Whether an order of the Public Service Commission of the State of New York (which order has the force of law in the State of New York) prohibiting the management of utilities under its jurisdiction from including material on "controversial matters of public policy" in envelopes used to render bills to customers violates appellant's expressional rights guaranteed by the First and Fourteenth Amendments.

Statutes Involved

Section 4, subd 1 and Section 66, subd 1 of the Public Service Law of the State of New York grants the Public Service Commission of the State of New York, among other things, "all powers necessary" to carry out the purposes of the Public Service Law and to "supervise" gas corporations and electric corporations.

Section 66, subd 12-a of the Public Service Law of the State of New York, which came into effect subsequent to the promulgation on February 25, 1977 of the Commission's order, in relevant part authorizes the Public Service Commission of the State of New York,

> ". . . to fix and alter the format and informational requirements of bills utilized by public and private gas corporations, electric corporations and gas and electric

corporations in levying charges for service, to assure simplicity and clarity . . .";

and provides that the Commission, among other things,

"shall further ensure periodic explanation of applicable rates and rate schedules for the purpose of assisting customers in making the most efficient use of energy".

In the decision appealed from, the Court of Appeals of the State of New York interpreted the cited provisions and the quoted language as authorizing

"the Commission to regulate not only the format and informational content of the bill itself but of the entire billing communication" (Appendix A, p. 6a)

and as empowering

"the Commission to regulate the billing process as a whole" (Appendix A, p. 7a).

The Court of Appeals' interpretation of the Public Service Law of New York State has the force of law. Such interpretation was invoked by the Court of Appeals in upholding the validity of the February 25, 1977, Public Service Commission order involved here on the ground of the interest of government in protecting the privacy of its ratepayers. That interpretation is challenged as applied.

The Public Service Commission of the State of New York ordered, in relevant part, that

"[a]ll utilities subject to the jurisdiction of this Commission shall discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial issues of public policy" (Appendix F, p. 58a).

The text of the provisions of Public Service Law cited above and the text of the February 25, 1977 order are set out in full at page 1s to page 3s of the Jurisdictional Statement and at page 57a to page 58a of Appendix F.

Interest of Edison Electric Institute

Edison Electric Institute is the principal national association of electric utility companies. Its members serve 99.1 percent of all customers of the investor-owned segment of the utility industry and supply 77.1 percent of the nation's electricity. The decision of the Court of Appeals of the State of New York from which this appeal is taken concerns a vital interest of EEI and its members—their unhindered freedom to communicate their views.

Statement

The salient features of the decisions below are described in the Statement of the Case provided in appellant's Jurisdictional Statement at page 5 to page 9. That discussion need not be repeated here.

The constitutional questions raised by the order of the Public Service Commission of New York and the Public Service Law of New York State, as applied, have far-reaching implications for all of the nation's investor-owned utilities, especially those engaged in the provision of gas and electric service to retail customers. The unfettered freedom to communicate with their customers is of importance to these utilities at all times. That freedom has become more precious, and the importance of its preservation more acute, in recent years as questions of energy supply and distribution have moved from the periphery of the nation's immediate concerns to the very center of national attention.

As the importance of full public debate of energy-related questions has grown, however, the ability of the nation's utilities to participate in the debate through communications with their ratepayers has been constrained. In California as well as New York and, potentially, in North Carolina, Iowa and Maine as well, restrictions have been imposed on the traditional, and most cost-effective, means available to such utilities to communicate their views, i.e., by enclosing materials on issues of general public concern in envelopes containing bills for services rendered.

The decision of the Court of Appeals of New York appealed from should be reversed. No governmental interest is served by banning from appellant's billing envelopes expressions of its opinions on controversial issues. In the absence of such governmental interest, the First and Fourteenth Amendments protect the freedom of appellant—and others—to speak in such form and require that the Commission's order be invalidated.

ARGUMENT

Speech of the kind banned from appellant's monthly bills by the Commission's order, i.e., speech on public issues,*

* The Court of Appeals did not expressly characterize the type of speech involved in the Commission's ban. The Commission suggested below that the bill inserts constituted "commercial speech" see, e.g. Brief for Respondent Public Service Commission of the State of New York on Appeal to the Court of Appeals of the State of New York, pages 10 to 16. It suggested, by analogy to the decision of this Court in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) that appellant's use of bill inserts was entitled to somewhat lesser protection than "free speech" on public issues. There can be little question, however, that the subject of the banned communication, i.e., "controversial issues of public policy," is more like traditional speech on public issues than "commercial speech" on the prices of goods for sale.

is, of course, at the "heart of the First Amendment's protection." *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 776 (1978).

The ban constitutes a "significant impairment" of appellant's ability to communicate its views to others, an impairment of the sort that may not stand except upon demonstration, after "exacting scrutiny", of a paramount government interest of "vital importance" in the restriction, *Elrod* v. *Burns*, 427 U.S. 347 (1976), *First National City Bank of Boston, supra*, at 786.

A. The Court of Appeals Misconstrued the Context of Its Decision

The decision of the Court of Appeals upholding the Commission's order is based on the finding of a governmental interest in the privacy of a utility's ratepayers. The Court's finding is invalid since there is in fact no governmental interest in the restriction imposed by the Commission, see discussion below p. 11. The Court's erroneous finding on the privacy issue was predicated, moreover, on significantly erroneous characterizations of the appellant and of the restriction placed on appellant.

1. *The Court of Appeals erroneously suggests that utilities are second-class citizens.*

It is now settled that the fact that the source of the speech is a corporation does not diminish or alter the character of the protection afforded by the First and Fourteenth Amendments, *First National City Bank of Boston, supra*, at 777. Consolidated Edison, and other utilities similar to it, are no different from other corporations in this respect.*

* One of the anomalies of the Court of Appeals' decision is its finding of statutory authority for the Commission's ban in an expansive interpretation of recent amendments to Section 66 of the

The Commission's ban significantly impairs appellant's ability to communicate its views on public issues. First, it entirely deprives Consolidated Edison of a traditional commercial vehicle for stating its views, a vehicle available to all other types of business should they wish to communicate with their customers. Second, it imposes on Consolidated Edison the burden of separate mailings should it wish to express its views on public issues to customers, a burden which, to the extent it increases appellant's costs of doing business, will reduce the frequency and likelihood of such communications. Consolidated Edison, and other utilities similarly situated, alone among commercial enterprises are thus barred from utilizing a conventionally available method of communicating their views.

The Court of Appeals and the Commission sought to rationalize this discrimination against utilities in different ways, both invalid. The Court of Appeals referred to the fact that "consumers of utility service, like many others in captive situations, have no choice concerning receipt of a periodic statement from the power company" (Appendix

Public Service Law, amendments now embodied in subd. 12-a which did not come into effect until August 1, 1977, or six months after the date of the Commission's order (L. 1977, c. 527, Section 1).

The Court of Appeals interpreted the new amendments to authorize the Commission to regulate not only bills *per se* but the entire billing process—i.e., the contents of the envelope. Accepting as unreviewable the validity of that interpretation, the question remains of its validity as a matter of constitutional law when applied, in an *ex post facto* fashion, to constrict the traditional scope of appellant's exercise of expressional rights.

The Court of Appeals' *ex post facto* reliance on these amendments puts its decision on a different statutory basis from that relied upon by Special Term in invalidating the Commission's order and by the Appellate Division in reinstating that order. Both lower courts primarily regarded the order as an exercise (in the case of Special Term, as an invalid exercise) of the Commission's duty to allocate costs for political advertising to shareholder accounts.

A, p. 10a). Yet that argument proves too much. All credit customers are, in that sense, "captives" of a creditor, so the Court of Appeals' argument would justify a state's legislating against any creditor's inclusion in his monthly bill of any material on issues of public concern. The Commission, in contrast, sought to rationalize the discrimination against utilities on the somewhat different ground of the privilege of state-franchised monopoly enjoyed by the utility, a privilege which may concededly be regulated to assure its being exercised in the public interest (Appendix G, p. 67a). No government interest, however, justifies the manner in which that privilege was regulated here, see discussion below p. 11. Neither the rationalization provided by the Court of Appeals nor that provided by the Commission, therefore, justifies their relegation of utilities to second class citizenship.

2. *The Court of Appeals erroneously held that the Commission's ban is not content-based.*

A second threshold issue erroneously dealt with by the Court of Appeals was the nature of the restriction in question, which it found to be a regulation of the "time, manner and place of communication" rather than of its content (Appendix A, p. 9a), citing *Grayned* v. *City of Rockford,* 408 U.S. 104 (1972), *Kovacs* v. *Cooper,* 336 U.S. 77 (1949), *Cox* v. *New Hampshire,* 312 U.S. 569 (1941). It correctly stated that, to be valid, a restriction on the time, place and manner of communication must be content-neutral, supported by a significant government interest, and not foreclose alternative channels of expression (Appendix A, p. 9a), citing *Virginia Board of Pharmacy* v. *Virginia Consumer Council Inc.,* 425 U.S. 748, 771 (1976).

No governmental interest, much less a significant one, is involved here, see below, p. 11, so that the ban must be

invalidated even if the Court of Appeals were correct that the ban is merely a "time, place and manner" restriction. But the Court is not correct that the standards to be applied are those relating to restrictions on "time, manner and place".

The Commission's ban is not a "time, manner, and place" restriction because the ban selectively applies only to inserts on controversial issues, not to all inserts. It is not, therefore, "content-neutral." Content, in fact, provides the criterion of selection and of prohibition. That fact alone removes it from the category of "time, place and manner" restrictions as to which some latitude is allowed within the proscriptions of the First and Fourteenth Amendments. Its exclusion from that category *ipso facto* subjects it to the conventional, and more difficult, showing of a government interest of "vital importance", *Elrod, supra,* p. 7 enunciated by this Court for justifiable restrictions on speech on public issues.

A traditional indicium of content-based restriction is the proscription of speech of a prescribed content, e.g., advocacy of minority rights, etc. It is true that, as the Court of Appeals pointed out, the Commission's ban does not "extend . . . to all speech of a prescribed content," and that "no one [substantive] viewpoint is singled out for special treatment, nor is the general right to express ideas in other forums affected" (Appendix A, p. 9a). But that does not mean that this restriction is not content-based. In fact, it clearly resembles a content-based restriction more than it does any other type of restriction. The ban proscribes, in the forum most suitable and traditionally most often employed for the purpose, the expression (i) by appellant (ii) of a stated category of views. It does not, for instance, ban expression by appellant of the controversial views of others. Nor does it ban expression by appellant of non-controversial views. This version of a content-based restriction is no less abhorrent to the First Amendment than less camouflaged versions.*

B. No Governmental Interest is Served by the Ban

The Court of Appeal's erroneous characterization of the restriction is less significant, however, than its ultimate holding that a governmental interest in privacy warranted the restriction. This is because both categories—the content-based restriction and the content-neutral restriction—measure the validity of the restriction in terms of the governmental interest served thereby. A restriction which, as here, serves no governmental interest cannot stand.

Several "interests" were hypothesized at various stages of the proceedings below. None can withstand the "exacting scrutiny" mandated by this Court, least of all the interest in "privacy" lately championed by the Court of Appeals.

1. *No interest in mental or physical privacy is infringed.*

The Court of Appeals, perceiving an interest in "privacy" which both lower courts had failed to perceive, invoked a governmental interest in protecting "those who are inflamed by having a particular opinion foisted upon them". Remarkably, it equated the uninvited receipt of divergent opinion with the disinvited receipt of the "offensive communication" involved in *Rowan* v. *United States Post Office Department,* 397 U.S. 728, 737 (1970)** (Appen-

---

* That the Commission's ban happens to apply only to mailing envelopes, the only mode of speech on controversial issues over which it has asserted jurisdiction, does not render it any less content-based.

** *Rowan* involved the constitutionality of a statute, 39 U.S.C. Section 4009, pursuant to which the Postmaster General might, on

dix A, p. 10a). It suggests, therefore, that the ban serves government interests in the protection against involuntary breach of a sort of "mental" privacy as well as a sort of "physical" privacy.

The privacy interests invoked by the Court of Appeals, while a legitimate government concern, are not in fact threatened in any meaningful way by the bill inserts. The Court of Appeals goes too far in speaking of the "foisting" by Consolidated Edison of its opinions on its ratepayers. Similarly it goes too far in maintaining that "[w]hatever materials are enclosed in the envelope are destined to come in contact with" the ratepayers with apparent analogy to the predicament of the bus rider forced to listen to radio advertisements during his ride (Appendix A, p. 10a). There is in fact no coercion to read Consolidated Edison's views when enclosed in a bill envelope. The ratepayer is entirely free not to read what he does not wish to read.

There is no invasion of physical privacy, either, in the receipt through the mailbox of Consolidated Edison's views. Those views are not themselves couched in offensive language and do not come within the restrictions permissible for such mail, see *Rowan, supra,* p. 11. Given that the language is unexceptionable and the mail not barred by the householder, the mailbox

> "is hardly the kind of enclave that requires constitutional defense to protect 'the privacies of life.' The short, though regular, journey from mailbox to trash

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request of a person receiving such mail, order the sender of "pandering" material to stop sending it to such person. The continued receipt, after protest, of such mail, involved, as the Court recognized, an element of trespass against the household. *Rowan* is inapposite to the instant case since the Commission's ban operates without regard to ratepayer consent.

> can . . . is an acceptable burden" *Lamont* v. *Commissioner of Motor Vehicles,* 269 F. Supp. 880 (S.D.N.Y. 1967) per Frankel, U.S.D.J. (involving the practice of the Commissioner of Motor Vehicles of selling registrants' names and addresses to mail advertising concerns).

2. *The governmental interests originally defined by the Commission provide no basis for upholding the ban*

In its original decision and in its decision on petition for rehearing, the Commission adduced several reasons relating, in general, to considerations of fairness, why government should restrict utility access to ratepayers. These reasons (which the Court of Appeals did not adopt and therefore by fair implication rejected) have no more validity than the one it did adopt.

In its original decision, the Commission defended its ban on the ground it is "basically unfair" to ratepayers who disagree with Consolidated Edison to "subject" them to its views through the billing mechanism since that mechanism "should be used for the benefit of both the consumer and the company" (Appendix E, p. 43a). In its decision on petition for rehearing, the Commission recast its "fairness" argument in terms of fairness to the public. It contended that its ban was intended to eliminate "an unreasonable advantage . . . that unduly discriminates against others who . . . oppose the company's views" (Appendix G, p. 65a).* Neither formulation of the "fairness" argument is, on analysis, justifiable.

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* The Commission has considered, but rejected as unworkable, a proposal that would have permitted imposition of "something like a 'fairness' or 'equal time' requirement" on utilities (Appendix G, p. 66a) similar to the Federal Communication Commission's "fairness doctrine", *id.*

The premise for the Commission's finding of "unfairness" to ratepayers is its statement that bill inserts ought to "benefit" both the customer and the company. In so reasoning the Commission used familiar (to the Commission) categories of utility law. These categories, however, have no place in the resolution of First Amendment rights. The First Amendment is not conditioned on a showing of mutual benefit and contains no provisos that the mode of communication be a "two way" mode, or that the person addressed agrees or can "talk back". To allow the benefit analysis derived from the Public Service Law to limit utilities' First Amendment rights would lay a basis for limiting *all* public utility communications to what the several utility regulatory commissions consider to be mutually beneficial to the ratepayer and the utilities.

The Commission's finding of "unfairness" to the public, like its finding of unfairness to the ratepayers, is premised on borrowed concepts alien to First Amendment law. Invoking the logic of communications law, the Commission theorized that appellant should not publicize its views in a scarce "medium" to which opponents of those views lack access. It suggests that, like radio and TV, the bill envelope should be regulated by government to assure that those privileged with access act as "trustees of the public interest" (Appendix G, p. 66a). The fallacy of the Commission's reasoning is that the bill envelope is, if anything, an economically limited resource, i.e., not a resource which is "limited" in a manner which Constitutional law recognizes as justifying restrictions based on "fairness",* see, *e.g., Miami Herald Publishing Company* v. *Tornillo,* 418 U.S. 241 (1974) (newspapers may not be regulated to serve a public interest merely because economic considerations limit the number of newspapers published).

* Radio and television, of course, operate in a physically limited entity, the spectrum of available channels.

The two types of "unfairness" perceived by the Commission, in sum, involve alien categories of utility and communications law which, if followed, would soon leave First Amendment protections empty of substance. Those categories may find the public good in mutuality of benefit or equal access. But the First Amendment embodies an individual right not dependent on another's views or ability to react.

CONCLUSION

This Court should note probable jurisdiction in order to review the decision of the New York Court of Appeals sustaining the ban of the Commission on controversial bill inserts. That decision, with its far-reaching implications for the investor-owned utilities industry, should be reviewed as violative of the First Amendment rights of Consolidated Edison.

Respectfully submitted,

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August, 1979

Supreme Court, U. S.
FILED
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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT FILED JULY 27, 1979
PROBABLE JURISDICTION NOTED OCTOBER 1, 1979

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

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11- 7-77	Verified Petition and Complaint Served.
11-28-77	Verified Answer Served.
12- 5-77	Verified Reply Served.
2-17-78	Opinion of the New York Supreme Court, Albany County, issued.
3- 6-78	Judgment of the New York Supreme Court, Albany County, entered.
3- 6-78	Notice of Appeal to the New York Supreme Court, Appellate Division, Third Judicial Department, served and filed.
7-27-78	Opinion of the New York Supreme Court, Appellate Division, Third Judicial Department, issued.
8- 2-78	Order of the New York Supreme Court, Appellate Division, Third Judicial Department, entered.
8- 9-78	Notice of Appeal to the Court of Appeals of the State of New York served.
8-14-78	Notice of Appeal to the Court of Appeals of the State of New York filed.
5- 1-79	Opinion of the Court of Appeals of the State of New York issued.
5- 1-79	Final Judgment of the Court of Appeals of the State of New York entered.
6-26-79	Notice of Appeal to the Supreme Court of the United States served and filed.

Verified Petition and Complaint of Consolidated Edison Company of New York, Inc.

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF ALBANY

Index No. 11163-77

In the Matter of

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Petitioner,

for a judgment pursuant to Article 78 of the CPLR,

—against—

PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK,

Respondent.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Plaintiff,

—against—

PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK,

Defendant.

Petitioner-Plaintiff CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. (Con Edison) by its attorneys, as and for its petition and complaint herein against respondent-

defendant PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK (the Commission), alleges:

NATURE OF PROCEEDINGS

1. This is a special proceeding together with actions for a declaratory judgment and an injunction seeking, on grounds of unconstitutionality, to set aside and enjoin the enforcement of certain orders of the Commission which prohibit Con Edison and other public utility corporations in this State from utilizing printed matter inserted with bills mailed to customers (bill inserts) as a means of expressing the views of such public utility corporations on "controversial matters of public policy." Since the expression of views on controversial subjects is precisely the liberty that is protected, to individuals and corporations alike, by the constitutional safeguards against infringement of freedom of speech and of the press, this restriction on Con Edison's freedom to communicate is a gross violation of the First Amendment to the United States Constitution as made applicable to the States by the Due Process Clause of the Fourteenth Amendment, and of similar provisions of the Constitution of the State of New York.

CAUSE OF ACTION FOR REVIEW UNDER
ARTICLE 78 OF THE CPLR

2. Petitioner-Plaintiff, Con Edison, is a corporation duly organized and existing under and by virtue of the laws of the State of New York, with its principal office at 4 Irving Place, New York, New York. Con Edison supplies electric service in five boroughs of New York City—Manhattan, The Bronx, Brooklyn, Staten Island and most of

Queens—and in portions of Westchester County; gas service in Manhattan, The Bronx and in parts of Queens and Westchester; and steam service in parts of Manhattan.

3. Respondent-Defendant, the Commission, is an administrative body organized and existing under the Public Service Law of the State of New York, charged with the responsibility by such law of regulating the rates and service of Con Edison with respect to the furnishing of electricity and gas (Article 4) and steam (Article 4-A). The Commission's principal office is in the City and County of Albany.

4. The orders and prohibitions at issue herein have been promulgated by the Commission under color of the authority granted to it by Articles 4 and 4-A of the Public Service Law.

5. Pursuant to Sections 73 and 86 of the Public Service Law, the Commission may impose forfeitures against Con Edison, or any officer, agent or employee thereof, for each violation of an order of the Commission.

6. Due to their effectiveness and relatively low cost, bill inserts constitute the principal means available to Con Edison for communicating information and views to its customers. There are no adequate alternatives.

(a) Con Edison utilizes bill inserts to convey messages required by the Commission's regulations or by law to be sent to its customers, and to communicate information on such topics as new rates, company procedures, safety in the use of the company's services, and conservation.

(b) In addition, Con Edison has utilized bill inserts, and desires to continue to utilize bill inserts, to communicate information and its views to its customers on subjects which are of importance to them as consumers of utility services. The Commission itself, in its policy statement (hereinafter more fully referred to in paragraph 7 below), has recognized the importance of such communication by stating that "The expression of a utility's views on a controversial issue may truly reflect its concern for the welfare of its consumers and may make a genuine contribution to a public policy debate. . ." Examples of the issues presently confronting the utility industry which have a significant bearing upon its consumers, and with respect to which the Commission's orders prohibit Con Edison from communicating its views to its customers by means of bill inserts, are the use of nuclear power to provide the needs of consumers for electric energy, the replacement of investor-owned utility service by government-owned facilities, the siting of power plants and other similar matters.

7. Notwithstanding the foregoing, on February 25, 1977, the Commission issued a "Statement of Policy on Advertising and Promotional Practices of Public Utilities" in which it announced (at p. 11) that

> "we will not permit bill inserts to be used by utility companies for the purpose of advertising their opinions or viewpoints on controversial issues of public policy."

(A certified copy of the Commission's Statement of Policy is annexed hereto as Exhibit I). [Printed in the appendix to the Jurisdictional Statement (31a-56a)]

8. The Commission's Statement of Policy relating to the use of bill inserts was implemented by an order issued on February 25, 1977, which provides that

> "All utilities subject to the jurisdiction of this Commission shall discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy."

(A certified copy of the Commission's February 25, 1977, order is annexed hereto as Exhibit II). [Printed in the appendix to the Jurisdictional Statement (57a-58a)]

9. On or about March 22, 1977, Con Edison applied to the Commission for rehearing pursuant to Section 22 of the Public Service Law, and on or about June 3, 1977, Con Edison filed with the Commission a supplement to its petition for rehearing. (Copies of Con Edison's petition for rehearing and the supplement to its petition for rehearing are annexed hereto as Exhibits III and IV, respectively). [Exhibit III omitted in printing]

10. By order issued on July 14, 1977, the Commission denied Con Edison's petition for rehearing. (A certified copy of the Commission's July 14, 1977, order is annexed hereto as Exhibit V). [Printed in the appendix to the Jurisdictional Statement (59a-71a)]

11. In forbidding Con Edison from using bill inserts to express its views on issues of importance to it and its customers, as hereinabove alleged, the Commission has unlawfully instituted a program of government censorship

and placed a prior restraint upon Con Edison's communications with its customers in violation of Con Edison's rights under the First and Fourteenth Amendments to the Constitution of the United States and under Article 1, § 8 of the Constitution of the State of New York.

12. In adopting a standard which permits Con Edison to use bill inserts to communicate "noncontroversial" matters to customers but forbids Con Edison from using bill inserts to communicate "controversial" matters to customers, the Commission has purported to regulate speech on the basis of content in violation of the First and Fourteenth Amendments to the Constitution of the United States and Article 1, § 8 of the Constitution of the State of New York.

13. In promulgating an order which purports to permit the expression of "noncontroversial" ideas but bans the dissemination of "controversial" material in bill inserts, the Commission has enunciated a standard for the regulation of communicative activity which a) fails to provide adequate notice of the scope of its proscription and b) fails to provide adequate guidance for its application and, thus, is void for vagueness under the First and Fourteenth Amendments to the Constitution of the United States and under Article 1, §§ 6 and 8 of the Constitution of the State of New York.

14. As a consequence of the Commission's orders, Con Edison is suffering irreparable injury by being prohibited from utilizing an effective and economical means of communicating information and views to its customers on "controversial matters of public policy."

15. The Commission's orders have substantially diminished Con Edison's ability to communicate information and views to its customers on issues of concern to Con Edison and its customers.

16. Con Edison has no plain, speedy, or adequate remedy at law.

CAUSE OF ACTION FOR DECLARATORY JUDGMENT

17. Con Edison repeats the allegations contained in paragraphs 1-16.

CAUSE OF ACTION FOR INJUNCTION

18. Con Edison repeats the allegations contained in paragraphs 1-16.

19. By application dated March 22, 1977, Con Edison applied to the Commission for stay of its order of February 25, 1977. Con Edison's application was denied by order of the Commission issued on March 30, 1977. (A certified copy of the Commission's order of March 30, 1977, is annexed hereto as Exhibit VI). [Omitted in printing]

WHEREFORE, Con Edison respectfully requests this Court to:

(1) review under Article 78 of the Civil Practice Law and Rules the orders of the Public Service Commission of February 25 and July 14, 1977, to the end that judgment be entered annulling, vacating and setting aside such orders to the extent they prohibit Con Edison from utilizing bill

inserts as a means of disseminating its views on controversial matters of public policy;

(2) declare that the Public Service Commission's orders of February 25 and July 14, 1977, to the extent they prohibit Con Edison from utilizing bill inserts as a means of disseminating its views on controversial matters of public policy, violate the First and Fourteenth Amendments to the Constitution of the United States, and Article 1, §§ 6 and 8 of the Constitution of the State of New York;

(3) grant judgment enjoining the Public Service Commission from enforcing its orders of February 25 and July 14, 1977, to the extent such orders prohibit Con Edison from utilizing bill inserts as a means of disseminating its views on controversial matters of public policy; and

(4) grant Con Edison such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
November 7, 1977

(Subscription and verification omitted in printing)

• • •

Exhibit IV Appended to Verified Petition and Complaint

BEFORE THE NEW YORK STATE

PUBLIC SERVICE COMMISSION

In the Matter of

STATEMENT ON POLICY ON ADVERTISING AND PROMOTIONAL PRACTICES OF PUBLIC UTILITIES

PSC Case No. 27052

SUPPLEMENT TO PETITION FOR REHEARING OF CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

To the Public Service Commission of The State of New York:

Consolidated Edison Company of New York, Inc. hereby supplements its Petition for Rehearing dated March 22, 1977, for the purpose of bringing to the attention of the Commission the implications to this case of the decision of the United States Supreme Court on May 2, 1977 in the case of *Linmark Associates, Inc.* v. *Willingboro,* 45 U.S.L.W. 4441.

By its "Statement of Policy on Advertising and Promotional Practices of Public Utilities" and accompanying order, issued on February 25, 1977, the Commission prohibited the use of bill inserts by utility companies for the purpose of communicating their opinions or viewpoints on controversial issues of public policy.

In its Petition for Rehearing dated March 22, 1977, Con Edison alleged that the prohibition was unlawful for several reasons, including the reason that the prohibition

abridged Con Edison's freedom of speech and press in violation of the First and Fourteenth Amendments to the United States Constitution. With respect to the anticipated argument that the prohibition is justifiable on the ground that alternative means are available for communication of the utilities' viewpoints, we pointed out (at p. 10 of our Petition for Rehearing) that the Supreme Court has said that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State,* 308 U.S. 147, 163 (1939); *See also, Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 757-58, n. 15 (1976).

The availability of alternative means of communication has been deemed to be a relevant consideration in cases involving "time, place, and manner" restrictions. As the Supreme Court stated in *Virginia Pharmacy*:

> "We have often approved [time, place, and manner restrictions] provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information." *Ibid.* at 771.

The Commission's prohibition cannot be justified as a proper time, place, and manner restriction because it regulates the content of communications, and under the principles of the decisions cited above the fact that alternative means of communication are available is not a relevant consideration. However, since the matter of alternative means of communication is specifically addressed in the United States Supreme Court's opinion in the recent *Lin-*

mark case, we now wish to show that even if alternatives were considered, it must be concluded that Con Edison has no adequate alternatives to bill inserts under the *Linmark* standards.

In *Linmark*, the Supreme Court struck down a municipal ordinance which prohibited the posting of real estate "For Sale" or "Sold" signs. The municipality attempted to justify the ordinance in part on the ground that it restricted only one method of communication, and that alternatives were available for communication of the sellers' messages.*

The standards utilized by the Supreme Court in analyzing this argument may be found in the following passage from the *Linmark* decision:

> "... serious questions exist as to whether the [Willingboro] ordinance 'leave[s] open ample alternative channels for communication.' *Virginia Pharmacy, supra,* 425 U.S., at 771. Although in theory sellers remain free to employ a number of different alternatives, in practice realty is not marketed through leaflets, sound trucks, demonstrations or the like. The options to which sellers realistically are relegated—primarily newspaper advertising and listing with realtors—involve more cost and less autonomy than 'For Sale' signs; are less likely to reach persons not deliberately seeking sales information; and may be less effective

* At the trial of the *Linmark* case in the District Court, the Court found that "approximately thirty percent of inquiries to [plaintiff's real estate] office are a result of 'For Sale' signs being posted on residences." The opinion of the district court is reproduced in the opinion of the Court of Appeals, *Linmark Associates, Inc.* v. *Willingboro,* 535 F.2d 786, 792, n.5. (3rd Cir. 1976). Seventy percent of plaintiff's inquiries thus came from sources other than "For Sale" signs.

> media for communicating the message that is conveyed by a 'For Sale' sign in front of the house to be sold. The alternatives, then, are far from satisfactory." *Ibid.* at 4443 (citations omitted).*

As indicated in the affidavit of Robert O. Lehrman, attached hereto and made a part hereof, Con Edison has no adequate alternatives to the use of bill inserts for communicating to its customers its views on controversial matters of public policy. A separate mailing would be prohibitively expensive. Television and radio advertising are not suitable means of communicating lengthy messages on complicated subjects. And newspaper advertising is more costly and less effective than bill inserts.

* In *Linmark*, the Court also considered the constitutionality of achieving governmental objectives by restricting the free flow of truthful information, and concluded that:

> "the First Amendment disabled the State from achieving its goal by restricting the free flow of truthful information." *Ibid.* at 4444.

The Court continued by referring to its decision in *Virginia Pharmacy,* where it rejected Virginia's claim that the only way it could enable its citizens to find their self interest was to deny them information that is neither false nor misleading:

> "'There is . . . an alternative to this highly paternalistic approach. That alternative is to assume that information is not in itself harmful, that people will perceive their own best interest if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.'" *Linmark Associates, Inc.* v. *Willingboro, supra* at 4444, quoting *Virginia Pharmacy, supra,* 425 U.S. at 770.

Exhibit IV Appended to Verified Petition and Complaint

WHEREFORE, your petitioner, the Consolidated Edison Company of New York, Inc., respectfully requests that for the reasons stated herein and in our Petition for Rehearing, the Commission grant rehearing and amend its Statement of Policy on Advertising and Promotional Practices of Public Utilities by revoking the prohibition as to the use of bill inserts by utility companies for the purpose of communicating their opinions or viewpoints on controversial issues of public policy.

Dated: New York, New York
June 3, 1977

(Subscription and verification omitted in printing)

Exhibit IV Appended to Verified Petition and Complaint

BEFORE THE NEW YORK STATE
PUBLIC SERVICE COMMISSION

In the Matter of

STATEMENT OF POLICY ON ADVERTISING AND PROMOTIONAL PRACTICES OF PUBLIC UTILITIES

PSC Case No. 27052

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

ROBERT O. LEHRMAN, being duly sworn, deposes and says:

1. I am Vice President for Public Affairs of Consolidated Edison Company of New York, Inc. ("Con Edison") and have knowledge of the matters involved in this proceeding and the facts set forth herein.

2. I make this affidavit for the purpose of showing that Con Edison has no adequate alternatives to the use of bill inserts for communicating to our customers our views on controversial matters of public policy.

3. In reaching this conclusion, I considered four alternative means of communicating our views on such issues to our customers: a separate mailing, and television, radio and newspaper advertising.

4. A separate mailing would be prohibitively expensive. We have a monthly basic bill run of 2.8 million.

Postage alone, at first class mail rates, would cost in excess of $350,000. Even at bulk mail rates, postage would cost $210,000. Because of manpower limitations, our mailroom would not be able to handle an additional 2.8 million pieces of mail in any month. We would thus have to utilize an outside contractor for handling such a mailing, the cost of which would be approximately $21,000.

5. Television is not an adequate or effective medium for communicating lengthy messages on complicated subjects to a mass audience. The issues to which the Commission's prohibition apply would require lengthy messages for the expression of our views. Our February 1976 bill insert on nuclear power is a good example. Television is simply not an effective medium for communicating our views on such subjects. Moreover, there are time limitations applicable to television commercials. Ordinarily a 60-second spot is the longest we could obtain. Again, due to the nature of the subject matter, our messages on controversial subjects of public importance would require more than 60 seconds. Further, there are very real questions as to whether television stations would accept advertising which *THEY* consider "controversial." The experience of Mobil Oil—to cite just one example—in being refused advertising time for what appeared to us to be non-controversial messages underscores the seriousness of the problem. Television and radio stations are admittedly frightened of equal time requirements that might be imposed under the Fairness Doctrine. Thus, they seem to err on the side of conservatism in rejecting any comments that may prompt a request for "equal time."

Moreover, even if television stations would accept our comments, it is an expensive medium. Production costs

for a 60-second television message would be approximately $5,000-$8,000. Costs for just one minute of television time in the New York area would range from $3,000 to $10,000, depending on the station and the time. The number of spots that would be required would depend on the importance of the message, and if we produced a message for television, we would ordinarily not run it fewer than 20 times.

6. Radio advertising, while less expensive than television advertising, is inadequate and ineffective for communicating lengthy messages on complex subjects for the reasons noted above. Studies show that commercial radio does not reach the majority of the adult population—a large part of our intended audience—in this area.

7. Newspaper advertising is more expensive in reaching as wide an audience among our customers as bill inserts. Newspaper advertising is also less effective than bill inserts for the reason that in newspapers our message must compete againt news stories, features and other commercial messages. If we were to use newspaper advertising, the most economical way of reaching the bulk of our customers would be to use The New York Times, The Daily News and The Westchester Rockland Newspaper group. A full page ad in these papers costs approximately $12,800, $10,800, and $4,700 respectively. Typesetting would cost an additional $2,000. Here again we would ordinarily run the message more than once. If we ran the message four times, which is the number of times we are required by law to publish proposed rate changes in the newspapers, the cost of newspaper advertising would be in excess of

Exhibit IV Appended to Verified Petition and Complaint

$100,000. Obviously, to state our point of view on a controversial issue, we would use many more insertions.

8. In sum, Con Edison has no adequate alternatives to the use of bill inserts for communicating to its customers its views on controversial matters of public policy. A separate mailing would be prohibitively expensive. Television and radio advertising are not suitable means of communicating lengthy messages on complicated subjects. And newspaper advertising is more costly and less effective than bill inserts.

/s/ ROBERT O. LEHRMAN
Robert O. Lehrman

(Sworn to June 3, 1977)

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Verified Answer of the Public Service Commission of the State of New York

STATE OF NEW YORK

SUPREME COURT—COUNTY OF ALBANY

Index No. 11163-77

(Caption omitted in printing)

Respondent, Public Service Commission of the State of New York answering the petition herein:

1. Denies the allegations contained in paragraph 1 of said petition.

2. Admits the allegations contained in paragraphs 2, 3, 4 and 5 of said petition.

3. Denies the allegations contained in paragraphs 6, 7 and 8 of said petition, except admits that Consolidated Edison has used bill inserts where required by Commission regulations, and to communicate information and its views to its customers, and that various issues confronting the utility industry have a bearing on its customers, and refers to the Commission's Statement of Policy on Advertising and Promotional Practices of Public Utilities and its Order issued February 25, 1977 appended as Exhibits 1 and 2 to the petition for the full and accurate contents thereof.

4. Admits the allegations contained in paragraphs 9 and 10 of said petition.

5. Denies the allegations contained in paragraphs 11, 12, 13, 14, 15 and 16 of said petition.

6. Denies the allegations repeated in paragraphs 17 and 18 of said petition which are denied in this Answer.

7. Admits the allegations contained in paragraph 19 of said petition.

AS AND FOR A STATEMENT OF THE GROUNDS OF THE ACTION TAKEN BY RESPONDENT PUBLIC SERVICE COMMISSION, AND AN AFFIRMATIVE DEFENSE TO THE PETITION, SAID RESPONDENT ALLEGES:

8. The Commission's action under review herein is a result of decisions in Commission Cases numbered 27036 and 27052. Case 27036 was commenced by Complaint dated May 24, 1976 by Natural Resources Defense Council, Inc. *et al.* which complained of a January 1976 bill insert by Consolidated Edison. The bill insert was a reprint of an article discussing the need for the development of nuclear power to meet the nation's energy demand. The complainants requested a ruling from the Commission seeking redress for the bill insert, prohibiting the company from discussing issues of a political nature in future bill inserts, and the opportunity to submit material for a future bill insert discussing complainants' views concerning nuclear power. A copy of the Complaint and Memorandum of Points and Authorities in Support of Complaint is appended hereto as Exhibit A. [Memorandum omitted in printing]

9. After the submission of complainants' Complaint, petitioner, Consolidated Edison submitted a Memorandum dated June 21, 1976 and a supplement dated July 1, 1976 opposing the relief sought by complainants. In turn, complainants submitted a response to Consolidated Edison's submission. A copy of Consolidated Edison's Complaint and supplement is appended hereto as Exhibit B. A copy of complainants' response is appended hereto as Exhibit C. [Exhibits B and C omitted in printing]

10. Based upon its decision in Case 27052, as discussed hereinafter, the Commission by Order dated February 17, 1977 denied the complaint of the Natural Resources Defense Council, Inc. *et al.*, since that matter had been disposed of within the context of the Commission's decision in Case 27052. A copy of the Commission's Order of February 17, 1977 is appended hereto as Exhibit D.

11. Commission Case No. 27052 was commenced by respondent's Order issued July 28, 1976 issuing a Notice of Proposed Policy Statement and Request for Comments on Advertising by Public Utilities and Electric Promotion Practices. The Notice discussed the issue of promotional, institutional and informational advertising by utilities. It solicited comments from interested parties by September 13, 1976. A copy of the Commission's July 28, 1976 Notice is appended hereto as Exhibit E.

12. In response to the Commission's Notice, comments were submitted by numerous parties including petitioner, Consolidated Edison. A copy of the comments received by the Commission are appended hereto as Exhibit F. [Omitted in printing]

13. After considering the comments of the parties, the Commission on February 25, 1977 issued its Statement of Policy on Advertising and Promotional Practices of Public Utilities. At the same time, the Commission issued an order implementing certain restrictions on utility advertising. A copy of the Commission's Statement and Order of February 25, 1977 are appended to the petition as Exhibits I and II.

14. By application dated March 22, 1977, petitioner applied for a stay of the Commission's order. By Order

issued March 30, 1977, the Commission denied petitioner's application. A copy of petitioner's application is appended hereto as Exhibit G. The Commission's order denying the application is appended to the petition as Exhibit VI. [Exhibit G omitted in printing]

15. Subsequent to the Commission's Order of February 25, 1977 several parties, including petitioner Consolidated Edison, applied for rehearing of the Commission's Order. Copies of the petitions for rehearing are appended hereto as Exhibit H, except the Consolidated Edison petition is attached to the petition as Exhibits III and IV. [Exhibit H omitted in printing]

16. By Order issued July 14, 1977, the Commission denied the petitions for rehearing including the petition by petitioner Consolidated Edison. A copy of the Commission's Order of July 14, 1977 is appended to the petition as Exhibit V.

17. Respondent, Public Service Commission's directives in its Cases 27052 and 27036 were made only after full consideration of the positions of all parties to the proceedings. The actions taken by the Commission were in all respects just, reasonable and lawful, and in no respects arbitrary, capricious, or unlawful.

WHEREFORE, respondent demands judgment confirming the Commission's determinations sought to be annulled herein and denying the relief sought by petitioner.

Dated: November 28, 1977

(Subscription and verification omitted in printing)

Exhibit A Appended to Verified Answer of the Public Service Commission of the State of New York

Before the

PUBLIC SERVICE COMMISSION

of New York

NATURAL RESOURCES DEFENSE COUNCIL, INC.
SCIENTISTS' INSTITUTE FOR PUBLIC INFORMATION,
FRIENDS OF THE EARTH,
CONSUMER ACTION NOW,
ZERO POPULATION GROWTH, NEW YORK CHAPTER,
JOAN MCCALL,
WILLIAM KLABER III,
SUSAN R. MAINWARING,

Complainants,

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

Respondent.

COMPLAINT

1. This is a complaint asserting that Respondent Consolidated Edison Company of New York, Inc. (hereafter "Con Edison") has unlawfully discriminated against complainants, Natural Resources Defense Council, *et al.* (hereafter "Complainants"), in violation of Sections 65(3) and 66(12) New York Public Service Law (McKinney 1955 and 1975), has violated the rights of Complainant organizations and their members under the First and Fourteenth Amendments to the United States Constitution and Article 1, Section 8, of the New York Constitution, has violated

accounting procedures set forth in 16 NYCRR Chapter II, account 426.4, and has failed to operate in the public interest, by utilizing its customer list and billing process to enclose in its January 1976 billing packet an insert which constitutes a political advertisement presenting an extremely one-sided discussion of the controversial issue of public importance of nuclear power development, charging such advertisement to its customers and declining to allow the billing packet forum to be used for presentation of opposing points of view. A copy of the January 1976 billing insert is attached hereto as Exhibit A. The relief sought herein includes: (1) a declaratory ruling that the expenses of this political advertisement, including the cost of production, printing, postage, envelope and labor, must be borne by Con Edison shareholders; (2) a declaratory ruling that henceforth the Con Edison customer list and billing process is not to be used for political advertising purposes; (3) a declaratory ruling that where the billing process had been used for purposes of propagating one side of an issue of political controversy, as it has in the instant case, the forum must then be opened to access by contrasting points of view; and (4) an order directing Con Edison to enclose an appropriate reply insert, as determined by the Public Service Commission, in the electric bills mailed during the month following the effective date of the order.

2. Complainant, Natural Resources Defense Council (NRDC), is a non-profit membership organization chartered in 1970 under the laws of the State of New York. NRDC has long been concerned about the problems of nuclear energy, is widely regarded as a leading critic of the government's nuclear energy programs, and has filed

several lawsuits on behalf of its approximately 25,000 members seeking better nuclear safeguards and standards, or greater candor, from federal agencies responsible for regulating nuclear power. 6,040 of NRDC's members reside within the New York City metropolitan area. Many are customers of Con Edison.

Complainant, Scientists' Institute for Public Information (SIPI) is a non-profit, membership organization chartered in 1963 under the laws of the State of New York. Roughly 800 of SIPI's 2,000 members reside within the New York City metropolitan area. Many are customers of Con Edison. Since its very inception, SIPI has been involved in nuclear power issues, receiving and disseminating information, and acting as plaintiff in a lawsuit, *SIPI* v. *AEC,* which required the Atomic Energy Commission to prepare an environmental impact statement on its Liquid Metal Fast Breeder Reactor program.

Complainant, Friends of the Earth (FOE) is a non-profit membership organization chartered in 1969 under the laws of the State of California. The New York chapter of FOE, which represents New York State, has approximately 2,200 members, the majority of whom live in the New York City area. Many are Con Edison customers. FOE has been heavily involved in nuclear power issues since its founding; its bi-monthly newspaper, *Not Man Apart,* features a special section on nuclear energy in each issue.

Complainant, Consumer Action Now (CAN) is a non-profit, membership organization chartered in 1970 under the laws of the State of New York. CAN has approximately 20,000 members, the majority of whom reside within the New York City metropolitan area. Many are customers of Con Edison. As a consumer information and education center, CAN has a particular interest in representing the

right of its members not to be charged by Con Edison for the distribution of one-sided information on nuclear power through the customer billing process.

Complainant, New York Chapter of Zero Population Growth (ZPG), is an unincorporated chapter of a non-profit national membership organization involved with population and environmental issues. The New York chapter has approximately 600 members. Many are customers of Con Edison.

Complainant, Joan McCall, is a Con Edison customer who resides at 1170 Fifth Avenue, New York, New York 10029.

Complainant, William Klaber III, is a Con Edison customer who resides at 7 Avenue A, New York, New York 10009.

Complainant, Susan R. Mainwaring, is a Con Edison customer who resides at 310 East 23rd Street, New York, New York 10010.

Those members of Complainant organizations who are Con Edison customers and ratepayers and individual complainants, who are Con Edison customers and ratepayers, have a right to receive information on both sides of the nuclear power debate, have a right not to be charged the cost of a one-sided presentation on the controversial issue of nuclear power development, and have a right not to have the customer list utilized for dissemination of a one-sided presentation on the controversial issue of nuclear power development.

3. Respondent, Con Edison, is an investor-owned public utility with an exclusive franchise to provide electric power service in an area including New York City and Westchester County, New York. Con Edison's rates and

service operations are regulated by the New York Public Service Commission.

4. In its monthly billings, Con Edison regularly encloses a newsletter entitled "Customer News." The newsletter inserted in the January 1976 billing packet contained an article captioned "Independence Is Still a Goal, and Nuclear Power Is Needed to Win the Battle." The article contends that the development of nuclear power is essential to the goal of energy self-sufficiency, that two-thirds of the American people favor building more nuclear power plants, and that the opponents of nuclear power give the impression that their numbers are larger than they actually are. Moreover, Con Edison argues that nuclear power is a proven technology, that it is safe, economical and clean. The company states that "nuclear power is not new or experimental"; that "no member of the public has ever been injured—much less killed—in a nuclear-related accident at a nuclear power plant"; that "uranium is the cheapest energy source available today with which to make electricity"; that the traces of radiation released into the air "are well within established local and national health standards"; that a nuclear power plant cannot explode; and that nuclear power is essential "to free our nation from dependence on foreign oil."

5. The development of nuclear power is a political and controversial issue of public importance nationally and in Con Edison's service area.

6. The Con Edison billing insert presents only one side of this political and controversial issue. Con Edison has completely ignored the substantial and widely-recognized contentions of Complainants and other critics of nuclear power that the operating nuclear reactors in this country

have been plagued by accidents, some serious, runaway costs and poor performance; that the likelihood of a major accident, which could be catastrophic, is greater than the industry and government promoters of nuclear energy would have the public believe; that the potential effects of radiation cannot be accurately calculated at this point in time; that the cost of nuclear power is directly affected by the fact that it is one of the most, if not the most, heavily government-subsidized source of energy in existence; that despite this subsidy the costs of nuclear power have risen and are rising dramatically; that the transportation of radioactive products along the highways and by airplane creates the real potential of a disastrous mishap; that the light water reactor, in operation today, could be subject to a meltdown causing a disastrous release of radioactivity to the environment; that the fast breeder reactor, now under development, theoretically can explode causing a release of radioactive elements; and that according to some expert estimates, if we were to increase our funding of solar energy research and development to a level comparable to that being invested in nuclear fission, this source might produce as large a share of our national energy requirements by the year 2020 as nuclear fission reactors. (Complainants rebuttal to Con Edison's "Customer News" of January 1976 is attached hereto as Exhibit B.)

7. At the time Con Edison mailed its pro-nuclear power bill insert, the New York State Legislature had before it the Safe Energy Act (A-7104-Haley-Kremer). This bill would halt the construction of additional nuclear power plants in the state and spur the development of alternative energy sources. Furthermore, the bill would exempt nuclear plant related expenses from the utility rate base.

8. Con Edison's one-sided discussion of the issues in its January 1976 bill insert clearly was intended to sway public opinion on this controversial bill.

9. In a letter dated March 31, 1976, to Charles F. Luce, Chairman of the Board of Con Edison, a copy of which is attached hereto as Exhibit C, Complainants expressed their concern that the Con Edison ratepayers not be charged with this effort to influence public opinion on this highly complex and controversial political issue of nuclear power development. Complainants requested that the cost of this bill insert, including production, printing, envelope, postage, and labor, be charged to account 426.4, "Expenditures for Certain Civic Political and Related Activities," (16 NYCRR Chapter II), and hence treated as a below-the-line, non-operating expense. Secondly, Complainants expressed concern that Con Edison, a regulated utility with monopoly status, has used its special access to its customer list to present to those customers only one side of this political and controversial issue of public importance, in which Con Edison has a huge personal economic stake. In view of the irreparable harm already suffered by Complainants, and other Con Edison ratepayers, as a result of this use of the customer billing list, Complaints urged that the only appropriate remedy is that the customers of Con Edison must be presented with the opposing point of view, and offered their rebuttal to the January 1976 "Customer News" bulletin as an appropriate response for inclusion in the next Con Edison billing.

10. In a letter dated April 6, 1976, to Marc P. Reisner of the Natural Resources Defense Council, a copy of which is attached hereto as Exhibit D, Joyce H. Tucker, assistant

Vice-President of Con Edison, responded that the utility has a "responsibility and duty . . . to put the nuclear power issue into perspective for our customers;" rejected Complainants request that Con Edison afford its critics an opportunity for rebuttal; and stated that "this bill insert clearly falls in the category of customer information and education and, as such, all costs associated with it are proper operating expenses."

11. Con Edison is an investor-owned public utility which, by virtue of a franchise from the State of New York, has a legal monopoly over the provision of electric power service in New York City and Westchester County, New York. Con Edison is required, in its accounting procedures, to deduct from its income expenditures for political activity, including expenditures "for the purpose of influencing the decisions of public officials or advancing the political objective of the utility." 16 NYCRR Chapter II, account 426.4. *See also,* Federal Power Commission Uniform System of Accounts, Subaccount No. 426.4. Such expenditures are properly charged to the company's shareholders and are not to be considered operating expenses to be borne by the company's ratepayers. Thus, Con Edison may not charge any of the costs of its January 1976 pro-nuclear power bill insert to its customers and ratepayers.

12. Moreover, Con Edison is prohibited by statute from making or granting

> any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or subject[ing] any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. Section 65(3) New York Public Service Law (McKinney 1955).

or from extending

> to any person any form of contract or agreement, or any rule or regulation, or any privilege or facility, except such as are regularly and uniformly extended to all persons under like circumstances. Section 66(12) New York Public Service Law (McKinney 1975).

As a government-sanctioned, government-regulated monopoly, Con Edison was required to refrain from using its special access to the customer mailing list through the monthly billing mechanism for purposes of propagandizing this "captive audience" on one side of a controversial political issue in which it has enormous self-interest, and to refrain from charging any of the costs of such political advertising to its utility customers.

13. Having used the billing packet for purposes of propagating its political point of view, however, Con Edison converted the utility's otherwise neutral mailing into a forum for political debate on this controversial public issue. Hence, Sections 65(3) and 66(12) of the New York Public Service Law, the First and Fourteenth Amendments to the United States Constitution, Article 1, Section 8 of the New York Constitution, and proper public policy require that the billing packet forum be made equally accessible to critics of nuclear power development. Con Edison's use of the billing mechanism for presenting one side of the issue

of nuclear power development has conferred an undue or unreasonable preference or advantage upon the company's management and stockholders, and those who agree with Con Edison's point of view on this issue, in violation of Section 65(3) New York Public Service Law. Con Edison has extended to such persons the privilege of access to the facility of the billing packet and has denied this privilege to those who disagree with Con Edison, in violation of Section 66(12) New York Public Service Law. This denial constitutes an undue or unreasonable prejudice or disadvantage to Complainants, also in violation of Section 65(3) New York Public Service Law, and constitutes an abridgement of Complainants' rights, under the First and Fourteenth Amendments to the United States Constitution and Article 1, Section 8 of the New York Constitution, to communicate and to receive arguments on both sides of an important controversy affecting the public health and safety.

WHEREFORE, Complainants request that the Commission issue:

1. a declaratory ruling that the costs of the January 1976 billing insert, including production, printing, postage, envelope and labor must be charged to account 426.4 and thus borne by the shareholders of Con Edison;

2. a declaratory ruling that henceforth the Con Edison customer list and billing process is not to be used for purposes of political advertising;

3. a declaratory ruling that where the billing process has been used for purposes of advocating one side of a political and controversial issue of public importance, the forum of

the billing packet must then be opened to contrasting points of view;

4. an order directing Con Edison to enclose an appropriate insert, which presents contrasting points of view on the issue of nuclear power development, as determined by the Public Service Commission, in the electric bills mailed during the month following the effective date of the order.

5. an order granting such other and further relief as the Commission deems necessary and appropriate.

(Subscription omitted in printing)

May 24, 1976

Exhibit A Appended to Verified Answer of the Public Service Commission of the State of New York

"Exhibit A"

Con Edison January, 1976

CUSTOMER NEWS

Independence Is Still a Goal, and Nuclear Power Is Needed To Win the Battle

As our nation celebrates the Bicentennial of its political independence, it is still far from winning its battle for energy independence.

The oil-exporting nations have shown they can cripple our economy by tripling or quadrupling the price of oil at will, or by cutting off oil supplies entirely. Yet our nation has made almost no progress toward the goal of energy self-sufficiency.

Efforts are even being made to block development of the energy resources our nation does have—such as off-shore oil and gas, coal and nuclear power. Along with a strong program of energy conservation, development of these resources is essential if we are to break the grip—economic and political—that the oil-exporting countries hold on our nation.

The efforts to slow down or halt the development of nuclear power are of particular concern to us as we seek to meet our obligations as the supplier of electricity to 9 million people.

A recent Louis Harris poll shows that almost two-thirds of the American people favor building more nuclear power plants, with only 19 percent opposed. But opponents of nuclear power sometimes give the impression that their numbers are larger than they actually are—a fact that was also pointed out by the Harris poll.

Exhibit A Appended to Verified Answer of the Public Service Commission of the State of New York

No technology—be it airplanes or elevators—is without risk, and nuclear power is no exception. We do not claim otherwise. However, we believe the benefits of nuclear power far outweigh any potential risk. Therefore, we thought you would be interested in the following facts about nuclear power:

1. *Proven Technology*—Nuclear power is not new or experimental. There are more than 50 nuclear power plants licensed to operate in this country and nearly twice as many in foreign countries. Five are in New York State. By 1990, 16 additional units are planned to be in operation in New York State.

Nuclear power plants make electricity the same way conventional power plants do except that instead of burning coal or oil or natural gas to boil water to make the steam to turn turbine-generators, nuclear plants get their heat from the energy released from splitting atoms.

2. *Safe*—No member of the public has ever been injured —much less killed—in a nuclear-related accident at a nuclear power plant. Working in nuclear power plants is so safe that workers can buy life insurance at the same rates as other people. According to a reactor safety study by Dr. Norman C. Rasmussen of the Massachusetts Institute of Technology, the chances of being killed in an auto accident in any one year are one in 4,000 compared to one chance in 5,000,000,000 of being killed in a nuclear reactor accident. This assumes 100 nuclear power plants in operation—twice as many as in operation today in the U.S.

3. *Economical*—Except for water power, which is not available to Con Edison, uranium is the cheapest energy

source available today with which to make electricity. In 1975, electricity produced at our nuclear power plant at Indian Point saved Con Edison's customers more than $120 million in *fuel costs,* including related taxes. The *total cost* of electricity produced at Indian Point in 1975 was only one-third to one-half the cost of electricity produced at Con Edison's modern oil-fired power plants.

4. *Clean*—Although sophisticated equipment is used to minimize air pollution at fossil-fueled plants, even the most modern oil or coal plants can't match nuclear plants for cleanliness. Nuclear power plants put into the air none of the usual pollutants that come from a conventional power plant. This is because there is no combustion. Traces of low-level radiation are released into the air, but these small amounts are well within established local and national health standards. A former Atomic Energy Commission commissioner, Clarence E. Larson, put things in perspective when he said: "A person living every minute at the boundary of one of our licensed nuclear plants—drinking the discharge water, breathing the air and eating fish from the same water—would have to remain there for more than 200 years to get the same radiation exposure effect as will result from a single chest X-ray.

5. *Can't Explode*—A nuclear power plant cannot explode like a bomb because the arrangements and characteristics of the key ingredients are fundamentally different.

6. *Needed for Energy Independence*—A one-million-kw nuclear power plant saves about 10 million barrels of oil a year—enough oil to provide electricity for a city of about 1,000,000 people. Further, reducing oil imports that much

means about $125 million a year less going to foreign oil-producing countries. If we are going to free our nation from dependence on foreign oil, we will need more nuclear power, not less. Coal is not permitted in New York City for the generation of power, and the supply of natural gas is growing ever shorter. We support development of advanced forms of energy production. But solar electric power, fusion and other future methods for generating electricity are still far from practical everyday use. Nuclear power is here and now.

"Exhibit B"

REBUTTAL TO CON EDISON "CUSTOMER NEWS," JANUARY 1976

With your January Con Edison bill, you received a "Customer News" bulletin with a statement about energy independence and nuclear power. We feel strongly that the opinions presented in this statement as "facts" need to be examined from an opposing viewpoint in order to enable citizens to develop informed opinions on this matter based on a just and reasonable balance of information.

Con Edison claims that efforts are being made to "block development of the energy resources our nation does have —such as off-shore oil and gas, coal and nuclear power." The truth of the matter is that no responsible person or organization wants to "block" the development of coal or off-shore oil and gas. However, environmentalists have raised some legitimate questions about the costs, timing, safeguards, and priorities involved in such development. In a similar manner, we have raised legitimate questions about nuclear energy—the subject under discussion here—because we believe that making ourselves hopelessly dependent on it—which is the course we are presently on—has profound implications that all of us, as citizens of a free society, have a responsibility to think about.

If we are going to build hundreds if not thousands of nuclear power plants during the next few decades, there must be reasonable assurances that nuclear power is acceptably *safe* and *economical*. Contrary to what Con Edison says, there are still no firm assurances that it is either one.

Con Edison Claim Number One: Nuclear power is a proven technology

Although there are 56 operating nuclear reactors in this country, they have been plagued by accidents (some of them serious), runaway costs and poor performance. The average nuclear plant produces only 56 percent of the electricity it can theoretically generate because of chronic reliability problems, and the newer and larger reactors are, surprisingly, much less reliable than the older and smaller ones.

In a recent fifteen-month period there were 861 "abnormal occurrences" in U.S. reactors, including such potentially dangerous phenomena as fuel densification, fuel rod warping, and coolant pipe fissuring. Some of these problems continue to worry and baffle nuclear engineers, and were part of the reason that three senior General Electric engineers quit their jobs in protest last February, saying that nuclear power plants are "technological monsters" which cannot be controlled.

Con Edison Claim Number Two: Nuclear power is safe

The statement that "no member of the public has ever been injured—much less killed—in a nuclear-related accident at a nuclear power plant" is both premature and misleading—somewhat reminiscent of the old tobacco industry claim that it has never been "proven" that cigarette smoking has killed anyone. Nuclear power plants produce radiation, and radiation can cause cancer—but cancer takes ten to twenty years to develop and the cause is usually difficult, if not impossible, to identify.

Although nuclear plants are heavily shielded against releases of radioactivity and their record in this regard has

been good, the real issue is that, should a major accident occur, thousands of people could be killed outright and many more contaminated with potentially lethal doses of radiation. (A single large plant contains the radiation equivalent of *20,000* Hiroshima bombs.) Many eminent scientists, including Nobel laureates, believe that the likelihood of such a catastrophic accident occurring is far greater than the nuclear industry would have us believe. Most of the work on the Rasmussen Study cited by Con Edison was actually performed by staff members of the ardently pro-nuclear Atomic Energy Commission, and the methodology of parts of the study has been criticized by the American Physical Society, the preeminent organization of physicists in this country.

Con Edison Claim Number Three: Nuclear power plants are economical

Nuclear power is the most heavily subsidized source of energy in existence. Most of the multi-billion dollar research and development costs were paid, and are still being paid, by the federal government. All the enormously sophisticated and expensive uranium enrichment plants were built by the government. Uranium exploration is being subsidized by the government (the oil companies do their own exploration). The expensive search for a suitable radioactive waste disposal site is being carried out by the government. Nearly four-fifths of the nuclear insurance taken out by utilities operating nuclear plants is guaranteed by the government. And now nuclear proponents are proposing that more billions in taxpayer dollars be funneled into the financially troubled nuclear industry.

If, despite these hidden subsidies, Con Edison insists upon calling nuclear power "cheap", it should at least tell

its customers about the rate at which the costs of nuclear power have been rising. Nuclear power plants are now 16 percent more expensive to build than scrubber-equipped coal-fired plants, and a team of scientists at Harvard and M.I.T. recently concluded that nuclear plant construction costs are increasing twice as fast as those of coal-fired plants. Meanwhile, uranium fuel which not long ago was expected to cost $17 per pound in 1985 is already difficult to obtain for less than $30 per pound. Nuclear power may be cheaper today if one forgets about its vast government support, but its economic advantage is being steadily eroded.

Con Edison Claim Number Four: Nuclear power is clean

Even though radioactive emissions from a nuclear plant operating normally are relatively insignificant compared to background and medical radiation, each reactor contains an awesome inventory of hideously toxic radioactive products with half-lives ranging upwards of 24,000 years (meaning they must be guarded literally forever). These lethal substances cannot stay in the reactor indefinitely; periodically they must be taken out and reprocessed or disposed of. As a result, they are regularly moving along our highways, and a substance frequently described as the most dangerous ever handled in quantity by man—plutonium—has been flown into Kennedy Airport, despite doubts on the part of some experts that the containers in which the powdered plutonium was shipped could withstand a high impact airplane crash. In forty-five years, according to a 1974 Atomic Energy Commission report, there could be 55,000 annual shipments of highly radioactive spent fuel assemblies alone. At some points in the nuclear fuel cycle, such ship-

ments will make inviting targets for terrorists or deranged criminals, because purified plutonium can be used to make a crude fission bomb and other radioactive substances could wreak havoc if dispersed.

Con Edison Claim Number Five: A nuclear power plant cannot explode

A *light water reactor*—the type in operation today—cannot explode. However, if the cooling water is lost, the core could melt through the bottom of the reactor, causing a disastrous release of radioactivity to the environment. Thus one of the most important safety systems in a reactor is the emergency core cooling system, which is designed to flood the reactor core with water in an emergency and prevent a meltdown from occurring. But full-scale emergency core cooling systems have never been tested, and tests on a miniature-scale model failed repeatedly despite computer predictions that this would not happen.

A new type of reactor being developed today, which Con Edison is pushing very emphatically, is called the *fast breeder reactor*. Unlike a light water reactor, a fast breeder *can* theoretically explode. Such an explosion is admittedly unlikely and would be nothing like an atomic bomb, but some responsible scientists believe that it might be sufficient to rupture the reactor's containment structure and release the viciously poisonous radioactive elements inside.

Con Edison Claim Number Six: Nuclear energy is needed for energy independence

America's use of energy is wasteful and extremely inefficient. According to estimates of the federal government and the Ford Foundation's recently completed Energy Pol-

icy Project, a comprehensive national program of energy conservation and improved efficiency could save as much energy as nuclear power is expected to produce by the end of this century. Such a program would probably be much cheaper, kilowatt for kilowatt, than building nuclear power plants.

Another federal study, commissioned by NASA and the National Science Foundation, predicted that if we were to increase our funding of solar energy research and development to a level more comparable to the funding now going into nuclear fission, this seemingly safe, non-polluting and eternally renewable source of energy could produce nearly as large a share of our national energy requirements by the year 2020 as nuclear fission reactors. A crash program to develop safer alternative sources of energy, combined with tough conservation and efficiency programs and burning of coal and some oil away from densely populated areas, could greatly reduce the need for new nuclear power plants.

We realize that Con Edison has a special problem in that it is currently prohibited from burning coal in New York City. However, this is no reason for Con Edison to paint such a rosy picture of nuclear power for its customers when the actual facts do little to support the company's unjustifiably optimistic and one-sided view.

We strongly support the goal of energy independence. But all citizens today must beware that, in our struggle for self-sufficiency, we do not blindly embrace a solution which could cause grievous public injury and domestic insecurity, at the same time creating an awesome burden of responsibility for future generations of Americans.

Exhibit A Appended to Verified Answer of the Public Service Commission of the State of New York

"Exhibit C"

(Letterhead of Natural Resources Defense Council, Inc. omitted in printing)

March 31, 1976

Mr. Charles F. Luce, Chairman
Consolidated Edison Company
of New York, Inc.
4 Irving Place
New York, New York 10003

Dear Mr. Luce:

In its January 1976 billing packet, Con Edison inserted a "Customer News" bulletin with a statement about energy independence and nuclear power. The article attempts to persuade Con Edison customers that nuclear power is a proven technology, that nuclear power is safe, that nuclear power is clean, that a nuclear power plant cannot explode, and that nuclear energy is needed for energy independence.

The Natural Resources Defense Council, the Scientists' Institute for Public Information, Consumer Action Now, the Environmental Action Coalition, Friends of the Earth, and the New York Chapter of Zero Population Growth are concerned that the ratepayers of New York not be charged with this effort to influence public opinion on the highly complex and controversial political issue of nuclear power development. (All of the above mentioned scientific, consumer or environmental organizations are concerned about the implications of rapid nuclear power development and represent thousands of citizen members in New York City and Westchester County, many of whom share this con-

Exhibit A Appended to Verified Answer of the Public Service Commission of the State of New York

cern.) It is clear that the cost of this bill insert should be charged to account 426.4 (16 NYCRR Chapter II), which includes expenses "for the purpose of influencing public opinion" with respect to issues requiring action by legislative bodies or regulatory agencies, as well as expenses "for the purpose of influencing the decisions of public officials or advancing the political objectives of the utility." Under this classification the cost of the advertisement would not be considered an operating expense chargeable to the Con Edison ratepayers, but properly charged to the company's shareholders.

Our concern, however, is not only with the cost of preparing and printing the pro-nuclear power message. Reason dictates that if a political message is to share an envelope with the customer's monthly bill (and we seriously question the propriety and legality of this practice), the advertisement should not in effect have a "free ride" on the billing process but, rather, should share the costs of postage, envelopes, labor, etc. A proper allocation of the costs between ratepayers and shareholders must include all expenses in the total process.

Moreover, we are concerned that Con Edison, a utility with monopoly status, has used its special access to the customer list to present to those customers only one side of this political and controversial issue of extreme public importance, in which Con Edison has a huge personal economic stake. We believe that some of the "facts" presented in this statement are incorrect or misleading. We also believe that the Con Edison statement misrepresents the goals of those who have challenged some of the federal government's energy programs. For example, the statement that nuclear power is "the cheapest energy source

available today with which to make electricity" relies on certain assumptions which have been disputed by responsible authorities on nuclear power economics and ignores the vast taxpayer-financed subsidies which have been poured into the nation's fission power program; and the claim that nuclear power plants "cannot explode like a bomb" does not apply to breeder reactors and should probably be qualified even in the case of light water reactors because of the potential for steam explosions. Also, we are particularly concerned that Con Edison obliquely accuses environmentalists of trying to "block development of the energy resources our nation does have." Raising questions about the cost, safety, or wisdom of energy programs is a far cry from attempting to "block" them. In short, we believe that the consumers of electrical power must, in fairness, be given the opposing point of view.

We request that you inform us, as soon as possible, how Con Edison intends to classify the costs of this political advertisement, including the total costs of the mailing process. In addition, we offer for your consideration our rebuttal to your allegations regarding nuclear power. We suggest that our response would be appropriate for inclusion in the next Con Edison billing, in order that your customers might receive a fair and well-balanced presentation on this complicated and controversial subject.

Sincerely yours,

Scientists' Institute for Public Information
Natural Resources Defense Council
Consumer Action Now Friends of the Earth
Environmental Action Coalition
New York Chapter, Zero Population Growth

"Exhibit D"

(Con Edison letterhead omitted in printing)

April 6, 1976

Mr. Marc P. Reisner
Natural Resources Defense
Council, Inc.
15 West 44th Street
New York, New York 10036

Dear Mr. Reisner:

The letter of March 31, 1976 to Mr. Luce, signed by you and others, has been referred to me for reply.

We must disagree with your assertion that the cost of the bill insert in question should be grouped with those expenses that are "'for the purpose of influencing public opinion' with respect to issues requiring action by legislative bodies or regulatory agencies, as well as expenses 'for the purpose of influencing the decisions of public officials or advancing the political objectives of the utility.'"

In our view this bill insert clearly falls in the category of customer information and education, and, as such, all costs associated with it are proper operating expenses.

Opponents of nuclear power had made many claims and statements that were not only untrue but—much worse—frightening to members of the public. As the operator of a nuclear facility within our service territory, we consider it our responsibility and duty to answer these statements and to put the nuclear power issue into perspective for our customers.

Exhibit A Appended to Verified Answer of the Public Service Commission of the State of New York

We cannot accept your suggestion that we enclose your proposed "response" with our next billing. Our January bill insert was in fact a response to the anti-nuclear views espoused by, among others, some of the organizations listed in your letter of March 31. These views have been widely disseminated and fully reported in the communications media, both within and outside of our service area.

Sincerely,

/s/ Joyce H. Tucker
Joyce H. Tucker

cc: Alan McGowan
Barbara Niles
Lorna Salzman
Sherry Koehler
Ingrid Eisenstadter

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Exhibit D Appended to Verified Answer of the Public Service Commission of the State of New York

State of New York

Public Service Commission

At a session of the Public Service Commission held in the City of Albany on February 17, 1977

Commissioners Present:

Alfred E. Kahn, Chairman
Edward Berlin, Deputy Chairman
Carmel Carrington Marr
Harold A. Jerry, Jr.
Anne F. Mead
Charles A. Zielinski

Case 27036—Complaint of Natural Resources Defense Council, Inc. *et al.* with respect to a billing insert of Consolidated Edison Company of New York, Inc. concerning nuclear power.

• • •

By the Commission:

By complaint dated May 24, 1976, Natural Resources Defense Council, Inc., Scientists' Institute for Public Information, Friends of the Earth, Consumer Action Now, Zero Population Growth, New York Chapter, Joan McCall, William Klaber III and Susan R. Mainwaring (Complainants) complain of a bill insert circulated by Consolidated Edison Company of New York, Inc. (Consolidated Edison) in its January 1976 billing. The bill insert discusses the desirability and need for additional nuclear generating facilities as a means of guaranteeing the country's energy independence from foreign oil producers.

The Complainants have requested that the Commission issue a declaratory ruling that the cost of the insert be borne by the shareholders of Consolidated Edison, and that henceforth the Consolidated Edison customer lists and billing process not be used for purposes of political advertising. In addition they assert that where the billing process is used for advertising on one side of a political controversy, the billing packet must then be opened to contrasting points of view; therefore, the Complainants also request that the Commission order that Consolidated Edison enclose an insert representing the opposing points of view on the issue of nuclear power in a future monthly billing. The Complainants have previously written to Consolidated Edison requesting that the company insert their suggested billing supplement in its next monthly bill. The company has refused to do so. By response dated June 21, 1976, Consolidated Edison has opposed the relief sought by the Complainants. A reply dated July 23, 1976 was submitted by Complainants.

Subsequent to the complaint, we issued a Notice of Proposed Policy Statement and Requests for Comments on Advertising by Public Utilities and Electric Promotion Practices. Our resolution of the issues considered there provides the framework in which to consider the requests of Complainants. We have decided as a matter of general policy to disallow expenditures for political advertising when we determine rates for electric utilities. Further, as we discuss in our revised Statement, we have decided to prohibit utilities from using bill inserts to discuss political matters, including the desirability of future development of nuclear power.

As a result of these determinations, most of Complainants' contentions have been resolved. Our determination

that the billing process should not be used for political purposes makes it unnecessary that we discuss Complainants' request that it be opened to opposing points of view, except insofar as the request relates to bill inserts already published.

We are unable to agree with Complainants' request that we require a remedial bill insert in response to Consolidated Edison's January bill insert. That action would be dictated were Complainants' First Amendment rights to have been violated by "state action" as would have occurred had this Commission authorized Consolidated Edison to circulate its bill inserts.* But we did not. In *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974), the United States Supreme Court declined to find state action even though the customer disconnection involved there was undertaken pursuant to tariff leaves on file with the Pennsylvania Commission. Here the company's action was taken completely on its own without the consultation or approval of this Commission.

The Commission orders:

1. For the reasons discussed above, Complainants' request for relief from and redress of Consolidated Edison's January bill insert is denied.

2. This proceeding is closed.

By the Commission,

(SEAL) (SIGNED) SAMUEL R. MADISON
Secretary

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* As the United States Supreme Court recently stated, "it is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state." *Hudgens* v. *National Labor Relations Board*, 424 U.S. 507, 513 (1976).

Exhibit E Appended to Verified Answer of the Public Service Commission of the State of New York

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

NOTICE OF PROPOSED POLICY STATEMENT AND REQUEST FOR COMMENTS ON ADVERTISING BY PUBLIC UTILITIES AND ELECTRIC PROMOTION PRACTICES

(Issued July 28, 1976)

Over the years, the Commission has developed a series of policies relating to advertising by public utility companies and other practices designed to stimulate increased sales of electricity. Some of these policies have in recent months been called into question, and the Commission is considering revising them. To this end, we solicit comments from interested parties to be submitted, in writing, to the Secretary of the Commission, Empire State Plaza, Albany, New York 12223, not later than September 13, 1976.

The promotion of electricity sales

On December 6, 1973, at the height of the energy crisis precipitated by the exporting countries' boycott, the Commission flatly prohibited all sales promotional activities by electric companies. We are now considering relaxing that prohibition.

There is one aspect of the proposed relaxation on which we do *not* solicit comments at this time. That would be such promotion as would be the incidental consequence of efforts by electric utility companies to publicize, explain, and advise consumers on how best to take advantage of time-of-consumption rates. As the companies introduce

such rates, informational activities of this kind are clearly desirable, even where they might have the incidental effect of increasing the aggregate sales of electricity.

The proposition on which we do solicit reactions is that we relax our absolute prohibition of sales promotional activities by electric companies generally, apart from those that are merely ancillary to the introduction of time-of-consumption rates. (The distinction will in important instances be difficult to draw: since the downstate companies are summer-peaking, one purpose or result of rates varying by the season of the year could be to promote the use of electric heating, and, largely because of the very heavy use of electricity involved, this is the most controversial promotion of all.)

On the side of continuing the flat prohibition are such considerations as the following:

1. Electric companies are franchised monopolists, and no public interest or need is served by permitting monopolists to promote sales.

2. It is especially undesirable to cover the costs of such promotional activities in rates, thereby forcing captive customers to pay for activities designed to influence their consumption habits (in contrast with merely providing them with information).

3. Turning specifically to the promotion of electric resistance space and water heating: it conflicts with the national interest in energy conservation to promote additional utilization of electricity, which by its very nature uses approximately 3 Btu's of source energy to deliver 1 usable Btu. Electric resistance heating is therefore inherently inefficient in its use of primary energy, compared with the

direct burning of gas or oil in furnaces, even after making allowance for the greater efficiency-in-use of the electricity than those fuels.

4. The equipment for electric resistance heating is considerably less costly than for gas or oil. Since builders typically have a strong incentive to hold down the first costs of construction, they may already have a distorted incentive to install the former in preference to the latter, even though the result may be to impose markedly higher annual heating costs thereafter on the purchasers, who are frequently, perhaps typically, not in a position to weigh the higher future running costs against the lower initial purchase price in making their purchase decisions. In these circumstances, it is particularly undesirable further to encourage irrational purchase decisions by permitting the promotion of electric heating.

5. The heat pump promises to mitigate some of these efficiency disadvantages of electric resistance heating; however, the effects of its widespread introduction on utility peak load and load factors are uncertain.

Arguing on the side of a relaxation are the following considerations:

1. In major uses, electricity competes with oil and gas, and while we proscribe the promotion of gas, the distribution of heating oils is totally outside our control, and advertising by those distributors freely permitted: in these circumstances, it is not only unfair but produces distorted results for consumers to be freely exposed to advertising messages by one set of competitors, while the other is totally prohibited from communicating with them.

2. Electricity and electrical appliances compete with all other goods and services for the consumer's limited dollars. It is inconsistent with a consumer-sovereign and free enterprise economy for certain goods and services to be denied the right to compete for those dollars while other competitors—many of which may be promoting even less energy-conserving consumption—remain unrestricted. It is the function of a regulatory Commission in such an economy to see to it that prices accurately reflect cost—not to go beyond that and dictate to consumers and businesses, directly or indirectly, how they should allocate their expenditures. Consumers are, to be sure, entitled to protection against misleading advertising, and the foregoing considerations would probably not absolve the Commission from responsibility to ensure that the promotional information supplied by franchised public utilities is in fact not misleading. The proper solution to the possible problem, described earlier, arising from the possibility that builders may have a distorted incentive to install electric resistance heating, because of its lower first cost, is to provide purchasers with reliable info mation about the expected life cycle costs of buildings equipped with different heating systems.

3. The function of the Commission is to see to it that the prices of the services it regulates reflect society's costs in supplying them, and that consumers are well-informed—not to tell consumers what advertising messages they may and may not hear.

4. Gas is in short supply, and in most territories unavailable for use in new construction, so that for most uses the only available alternative to electricity for space heating

is oil. Prohibition of electricity promotion thus contributes to giving oil a monopoly in that market (whether this creates a danger of monopolistic exploitation depends on the effectiveness of competition in the oil industry).

5. While promotion of heating with electricity generated from oil (because of its less efficient use of the primary energy source) runs counter to our national policy of reducing our dependence upon imported oil, the increased use of electricity generated from nuclear fuel and coal would make a positive contribution to that goal.

6. Electric space heating is environmentally preferable to the direct combustion of oil: it is less polluting to burn fuels in central electricity generating stations than in thousands of individual furnaces.

Institutional and informational advertising

The Commission does not flatly prohibit advertising of these kinds, nor does it contemplate doing so. (Institutional advertising is difficult to define except as all advertising that is not fairly clearly intended to promote sales. It usually embraces informational advertising, but in some contexts a distinction between the two is useful.) The issue on which we solicit reactions has to do with the extent to which advertising of these kinds may properly be recovered in rates, as legitimate expenses of doing business and serving consumers.

We do not solicit comments on two kinds of advertising our policy with respect to which is of long standing and essentially noncontroversial:

1. Advertising that provides information of direct use to consumers is a legitimate expense of doing business, and

properly recovered in rates. This would include, for example, appeals for conservation; instructions in the proper use of equipment; information about new rates, billing practices, inspection and meter-reading; reports on matters of direct interest to the public concerning the utility company's service—service difficulties and progress in overcoming them.

2. At the other extreme, political advertising in support of or opposed to specific governmental actions—proposed legislation or referenda—may not properly be covered by rates, on the ground that it is either serving the interest or promulgating the particular opinions of management or shareholders, which may or may not coincide with those of ratepayers. Ratepayers should clearly not be expected to pay to have a company's political views expressed. All clearly political advertising is therefore recorded in a non-operating expense account, below the line, and expenditures recorded in this account routinely excluded from the rate-making process.

It is in the wide area between these two extremes that we seek guidance—the institutional advertising that is not clearly useful to utility customers, on the one hand, or clearly directed toward influencing specific legislation, on the other.

There is advertising, for example, in which a company defends, justifies, or even merely explains and describes its activities. It might be argued, on the one hand, that there is no reason for ratepayers to bear the costs of such self-justification; that it is not of direct usefulness to them. On the other hand, it is extremely difficult to argue, especially these days when public utilities are subjected to frequently unjustified public attack and criticism, that these

are not, within limits, legitimate and indeed inescapable costs of doing business in today's conditions. It seems unreasonable not to afford utility managements under attack an opportunity to explain and justify themselves. It might be argued, of course, that since such expenditures are on behalf of the companies rather than in the direct service of their ratepayers, they ought to be paid for by the shareholders. But if they *are* inescapable costs of doing business, and if, as in our policy, we allow shareholders returns only at the minimum level necessary to attract capital, then at least in principle if we were nominally to disallow these expenditures from rates, we would have to provide a correspondingly larger return on equity. It can be argued, in short, that "disallowances" of such expenditures from rates are nominal only, if not disingenuous.

One of the most controversial kinds of expenditure in this area is advertising that directly or indirectly promotes the merits of nuclear power. Argument over whether the cost of advertising of this kind should be allowed in rates has assumed major proportion. It might arguably be characterized either as informative, and permissible, or political, and to be disallowed.

The Commission has come to the view that exclusion of the costs of such advertising from rates on the traditional grounds that it can be fairly characterized as "political" is no longer adequate to protect the interest of the public generally and of ratepayers specifically. The public issues surrounding nuclear power generation are very complicated, and the public is being beset by discussions on matters in which it is of great importance that all points of view be presented. We feel there is a definite ratepayer interest, therefore, in a free and fair public discussion of this matter, and that utility companies do have a contribu-

tion to make to that discussion, regardless of whether we agree or disagree with the content of their messages in specific instances: after all, the Commission's assessments today of the substantive merits of controversies like these could well prove to be wrong tomorrow. Accordingly, a majority of us has in two recent cases considered advertising that presented the case in favor of nuclear generation to be informational in nature and properly included as a cost in computing rates in modest quantities. Others of us have felt, however, that such an allowance in rates should be permitted only on condition that the company use its funds to provide something like "equal time" to reasonable statements of legitimate opposition to this position. We will appreciate reactions to this latter alternative.

In addition to soliciting advice on these complicated matters, we solicit reactions to an alternative possible approach to this subject. The alternative would retain our present scrutiny of advertising with a view to continuing our traditional policy, described above, with respect to advertising that can clearly be labeled as informational on the one hand and political on the other—with routine allowance of the former and disallowance of the latter; but would abandon the necessity for detailed scrutiny and determination of what to do with advertising that falls in the broad and relatively amorphous midde area.

For that broad middle area of informational and institutional advertising, the suggestion is that we might routinely allow the companies in rates some very small pool of dollars, based roughly on past practices, probably on some sort of sliding scale—say, ranging between 1/10 and 1/25 of one percent in sales, possibly in inverse relationship to the size of the companies—and suspend the vexing and essentially arbitrary process of deciding with respect

to each advertisement whether it should be allowed or disallowed.

This proposal would obviously not solve all the problems we have described: we would still have to determine which advertisements are clearly political and/or self-serving, and specifically disallowed, and which clearly informational and of direct use to ratepayers, and therefore explicitly allowed; and parties in rate cases would still be free to question the propriety of the lump-sum allowance for advertising in the broad intermediate category. On the other hand, it would have the virtue of recognizing that some, modest institutional expenditures are an inescapable and legitimate cost of doing business, and get the Public Service Commission out of the business of any item-by-item content examination and evaluation of past advertisements—an activity in a sense redundant anyhow, in view of the fact that all we really do is set a reasonable level of rates for the future.

If any interested parties have alternative suggestions we would be pleased to receive them. In proposing alternatives, we ask respondents to bear in mind the desirability of reducing the considerable amount of staff and Commission time now consumed in the detailed scrutiny of advertising, and in hair-splitting determinations where the amount of dollars involved is close to minimal.

By the Commission,

SAMUEL R. MADISON
Secretary

• • •

Verified Reply of Consolidated Edison Company of New York, Inc.

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF ALBANY

Index No. 11163-77

(Caption omitted in printing)

Petitioner-Plaintiff CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. (Con Edison) by its attorneys, as and for its reply to the new matter contained in the answer of Respondent-Defendant PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK (the Commission), states as follows:

THE PETITIONER OBJECTS TO, AND MOVES TO STRIKE, THE NEW MATTER CONTAINED IN THE ANSWER HEREIN UPON THE GROUND THAT THIS COURT DOES NOT HAVE JURISDICTION TO REVIEW SUCH MATTER

1. This is a special proceeding together with actions for a declaratory judgment and injunction commenced by Con Edison seeking, on the grounds of unconstitutionality, to set aside and enjoin enforcement of orders of the Commission issued on February 25 and July 14, 1977, in Commission *Case No. 27052,* which prohibit Con Edison and other public utility corporations in this State from utilizing bill inserts as a means of expressing the views of such public utility corporations on "controversial matters of public policy."

2. *Case No. 27036* is a separate Commission proceeding which was commenced by Complaint dated May 24, 1976 by Natural Resources Defense Council, Inc. and seven other individuals and organizations, seeking various rulings

from the Commission with respect to the use of bill inserts by Con Edison. A Commission order disposing of the Complaint in Case 27036 was adopted at a session of the Commission on February 17, 1977, and was received by Con Edison on or about March 2, 1977. None of the parties to Case No. 27036 sought judicial review of the Commission's February 17, 1977 order in that proceeding, and an Article 78 proceeding for review of that order is now barred by the provisions of Section 217 of the CPLR.

3. In its Verified Answer in this proceeding, the Commission asserts that

> "The Commission's action under review herein is a result of decisions in Commission Cases numbered 27036 and 27052" (Verified Answer, ¶8).

4. In paragraphs 8-10 of its Verified Answer, the Commission describes the proceedings in Case No. 27036 and appends as Exhibits A through D to its Verified Answer the pleadings, briefs and its order in Case No. 27036.

5. After alleging certain matters relating to Case No. 27052 (Verified Answer, ¶11-16), the only Commission proceeding which is before this Court for review, the Commission's Answer concludes by asserting that

> "Respondent, Public Service Commission's directives in its cases 27052 and 27036 were made only after full consideration of the positions of all parties to the proceedings. The actions taken by the Commission were in all respects just, reasonable and lawful, and in no respects arbitrary, capricious, or unlawful" (Verified Answer, ¶17).

6. This Court has no jurisdiction to review the Commission's order in Case No. 27036. The Commission may not seek review of its own orders, and as alleged in paragraph 2 above, none of the parties to that proceeding has sought judicial review of the Commission's order in that proceeding, and an Article 78 proceeding for review of that order is now barred by the provisions of Section 217 of the CPLR.

7. Review of the Commission's order in Case No. 27036 is not necessary for review of the Commission's orders in Case No. 27052. Case No. 27052 was a separate proceeding wholly independent from Case No. 27036 and must stand or fall on its own record; indeed, Case No. 27036 is nowhere referred to by the Commission in its orders or Statement of Policy in Case No. 27052.

8. Consideration of the Commission's Case No. 27036 would be prejudicial to Con Edison by injecting irrelevant issues into this proceeding.

WHEREFORE, Con Edison demands judgment striking paragraphs 8 through 10 of the Verified Answer of respondent, so much of paragraph 17 as refers to Case No. 27036, and Exhibits A through D attached to the Verified Answer; and prays that the relief requested in its Verified Petition and Complaint be granted.

Dated: New York, New York
December 5, 1977

(Subscription and verification omitted in printing)

Judgment of New York Supreme Court, Albany County

Index No. 11163-77

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of Albany, at the County Courthouse, Eagle and Columbia Streets, Albany, New York, on the 9th day of December, 1977.

PRESENT:

HON. ROGER J. MINER,

Justice.

In the Matter of

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Petitioner,

for a judgment pursuant to Article 78 of the CPLR,

—against—

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondent.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Plaintiff,

—against—

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Defendant.

Judgment of New York Supreme Court, Albany County

The above-named Petitioner-Plaintiff ("Con Edison") having commenced a special proceeding and actions for declaratory judgment and injunction, under Article 78 and section 3001 of the Civil Practice Law and Rules, by a notice of petition and summons dated November 7, 1977, for judgment:

1. Annulling, vacating and setting aside orders of the Public Service Commission of February 25, and July 14, 1977, in a proceeding entitled "Notice of Proposed Policy Statement and Request for Comments on Advertising by Public Utilities and Electric Promotion Practices", to the extent such orders prohibit Con Edison from utilizing bill inserts as a means of disseminating its views on controversial matters of public policy;

2. Declaring that the orders of the Public Service Commission of February 25 and July 14, 1977, in a proceeding entitled "Notice of Proposed Policy Statement and Request for Comments on Advertising by Public Utilities and Electric Promotion Practices", to the extent such orders prohibit Con Edison from utilizing bill inserts as a means of disseminating its views on controversial matters of public policy, violate the First and Fourteenth Amendments to the Constitution of the United States and Article 1, §§ 6 and 8 of the Constitution of the State of New York;

3. Enjoining the Public Service Commission from enforcing its orders of February 25 and July 14, 1977, in a proceeding entitled "Notice of Proposed Policy Statement and Request for Comments on Advertising by Public Utilities and Electric Promotion Practices", to the extent such orders prohibit Con Edison from utilizing bill inserts

as a means of disseminating its views on controversial matters of public policy; and

4. Granting Con Edison such other and further relief as to this Court may seem just and proper,

And the said matters having regularly come on to be heard before me on the 9th day of December, 1977, and Petitioner-Plaintiff having appeared by Joseph D. Block, Esq. and Peter Garam, Esq., in support of the petition and complaint, the Respondent-Defendant having appeared by Peter H. Schiff, Esq., Howard J. Read, Esq., of Counsel, in opposition thereto, LeBoeuf, Lamb, Leiby & MacRae, Esqs., Ronald D. Jones, Esq. and Andrew Gansberg, Esq., of Counsel, having appeared in support of the petition and complaint for National Fuel Gas Distribution Corporation and Orange and Rockland Utilities, Inc., *amicus curiae,* and upon reading and filing the notice of petition and summons dated November 7, 1977, the petition and complaint, verified on the 7th day of November, 1977, and exhibits I through VI annexed thereto, the answer, verified on the 28th day of November, 1977, and exhibits A through H annexed thereto, and the reply, verified on the 5th day of December, 1977, and upon all the pleading and proceedings heretofore had herein, and after due deliberation the Court having made and filed a decision in writing on the 17th day of February, 1978, in favor of Petitioner-Plaintiff, and against Respondent-Defendant,

Now, on motion of Joseph D. Block, Esq., attorney for Petitioner-Plaintiff, it is

ADJUDGED AND DECREED that the relief requested in the petition and complaint be and the same hereby is granted in full; and it is further

ADJUDGED AND DECREED that the orders of the Public Service Commission of February 25 and July 14, 1977, in a proceeding entitled "Notice of Proposed Policy Statement and Request for Comments on Advertising by Public Utilities and Electric Promotion Practices", to the extent such orders prohibit Con Edison from utilizing bill inserts as a means of disseminating its views on controversial matters of public policy, be and the same hereby are annulled, vacated, and set aside; and it is further

ADJUDGED AND DECREED that the orders of the Public Service Commission of February 25 and July 14, 1977, in a proceeding entitled "Notice of Proposed Policy Statement and Request for Comments on Advertising by Public Utilities and Electric Promotion Practices", to the extent such orders prohibit Con Edison from utilizing bill inserts as a means of disseminating its views on controversial matters of public policy, are hereby declared to violate the First and Fourteenth Amendments to the Constitution of the United States and Article 1, §§ 6 and 8 of the Constitution of the State of New York; and it is further

ADJUDGED AND DECREED that the Public Service Commission be and hereby is permanently enjoined from enforcing its orders of February 25 and July 14, 1977, in a proceeding entitled "Notice of Proposed Policy Statement and Request for Comments on Advertising by Public Utilities and Electric Promotion Practices", to the extent such orders prohibit Con Edison from utilizing bill inserts as a means of disseminating its views on controversial matters of public policy.

Judgment of New York Supreme Court, Albany County

Dated March 2, 1978, Hudson, N.Y.

Enter.

/s/ Roger J. Miner
Justice of the Supreme Court

Guy S. Paquin

March 6, 1978

OFFICE OF
ALBANY COUNTY CLERK

MAR 6 1:11 PM '78
ALBANY, N.Y.

Notice of Appeal of the Public Service Commission of the State of New York to New York Supreme Court, Appellate Division, Third Judicial Department

STATE OF NEW YORK
SUPREME COURT—COUNTY OF ALBANY

Index No. 11163-77

(Caption omitted in printing)

PLEASE TAKE NOTICE that the above named Respondent-Defendant hereby appeals to the Supreme Court, Appellate Division, Third Department, from the Judgment of the Honorable Roger J. Miner, dated March 2, 1978, and entered in the Office of the Clerk of the County of Albany, New York, on the 6th day of March, 1978, and from each and every part of said Judgment and Order.

Dated: Albany, New York
March 6, 1978

(Subscription and addressees omitted in printing)

Order of New York Supreme Court, Appellate Division, Third Judicial Department

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 19th day of June, 1978.

Present:

HON. A. FRANKLIN MAHONEY,
Presiding Justice,
HON. LOUIS M. GREENBLOTT,
HON. MICHAEL E. SWEENEY,
HON. ROBERT G. MAIN,
HON. ANN T. MIKOLL,
Associate Justices.

County Clerk's Index No. 11163-77

In the Matter of

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Petitioner-Respondent,

For a judgment pursuant to Article 78 of the CPLR,

——against——

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Respondent-Appellant.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Plaintiff-Respondent,

—against—

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Defendant-Appellant.

Order of New York Supreme Court, Appellate Division, Third Judicial Department

The appellant, Public Service Commission of the State of New York having appealed from a judgment of the Supreme Court of Albany County, entered on the 6th day of March, 1978, in the office of the clerk of the County of Albany, and said appeal having been presented during the above-stated term of this Court, and having been argued by Howard J. Read, Esq., of counsel for appellant, and by Joseph D. Block, Esq., of counsel for respondent, and, after due deliberation, the Court having rendered a decision on the 27th day of July, 1978, Justices Sweeney and Main dissenting, it is hereby

ORDERED that the judgment entered March 6, 1978 be and hereby is reversed, on the law, without costs, and the order declared constitutional.

ENTER:

/s/ John J. O'Brien
Clerk

DATED AND ENTERED: August 2, 1978.

A TRUE COPY:
JOHN J. O'BRIEN
Clerk

Notice of Appeal of Consolidated Edison Company of New York, Inc. to Court of Appeals of the State of New York

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF ALBANY

Index No. 11163-77

(Caption omitted in printing)

PLEASE TAKE NOTICE that Consolidated Edison Company of New York, Inc. ("Con Edison"), relying upon questions directly involving the construction of the provisions of Article 1, Sections 6 and 8 of the Constitution of the State of New York and the First and Fourteenth Amendments to the Constitution of the United States, appeals as of right to the Court of Appeals of the State of New York from the order of the Appellate Division, Third Department, entered in the office of the Clerk of the Appellate Division on August 2, 1978, which order declared an order of the Public Service Commission constitutional and which order reversed on the law the judgment of the Supreme Court herein, entered in the office of the Clerk of the County of Albany on March 6, 1978. Justices Sweeney and Main of the Appellate Division, Third Department, dissented on a question of law in favor of Con Edison from the order of reversal and would vote to affirm the judgment of the Supreme Court on the law. The judgment of the Supreme Court annulled, declared unconstitutional, and permanently enjoined enforcement of orders of the Public Service Commission prohibiting utilities, including Con Edison, from utilizing bill inserts as a means of dis-

seminating their views on controversial matters of public policy.

PLEASE TAKE FURTHER NOTICE that Con Edison appeals from each and every part of the order of the Appellate Division and from the whole thereof, pursuant to Section 5601(a) and (b)(1) of the Civil Practice Law and Rules.
August 9, 1978

(Subscription and addressees omitted in printing)

Supreme Court, U. S.
FILED
AUG 27 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT BELOW

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August 24, 1979

BATAVIA TIMES, APPELLATE COURT PRINTERS
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

On Appeal From The Court Of Appeals
Of The State Of New York

MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT BELOW

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves (1) that this appeal be dismissed on the ground that it does not present a substantial federal question or (2) that the judgment of the New York State Court of Appeals sought to be appealed from be affirmed.

Statement

This case involves an appeal from a judgment (Appellant's Appendix pp. 29a-30a) of the Court of Appeals of the State of

New York which upheld an order by appellee Public Service Commission of the State of New York (Commission) restricting the use of utility bill inserts (leaflets enclosed with utility bills). The order prohibits utilities, including appellant Consolidated Edison Company of New York, Inc. (Consolidated Edison) from using bill inserts to disseminate messages espousing the position of utility managements on controversial matters of public policy.

The Commission's bill insert order was the culmination of its investigation of a complaint filed against Consolidated Edison by the Natural Resources Defense Council, Inc., *et al.* (NRDC). The NRDC objected to a Consolidated Edison bill insert discussing the need for nuclear power development. The complaint asked the Commission to ban the use of bill inserts for purposes of political advertising and, in addition, provide remedial relief to the complainants that would allow them to enclose a supplement in a future monthly billing presenting their views on nuclear power. The Commission concluded that the billing mechanism was an improper forum for use by utility management to express its views on controversial issues. The Commission stated (Appellant's Appendix p. 43a):

> Further, we shall not permit advertising on matters of public controversy to be included in the printed material that often accompanies the mailing of consumer bills. We believe that using bill inserts to proclaim a utility's viewpoint on controversial issues (even when the stockholder pays for it in full) is tantamount to taking advantage of a captive audience, since the consumer cannot avoid receiving the literature with the utility's message. Regardless of whether consumers read the material, it is basically unfair to subject ratepayers who disagree with the utility's viewpoint to the arguments of the utility through its billing mechanism. A utility company's mailing list provides an available conduit for the easy dissemination of information, which should be used for the benefit of both the consumer and the company to convey noncontroversial and useful information that will create a better informed public. It should not become a vehicle for dissemination only of the company's views on controversial matters of public policy. Accordingly, we will not permit bill inserts to be used by utility companies for the purpose of advertising their opinions or viewpoints on controversial issues of public policy.

When denying rehearing, the Commission discussed its rationale in greater detail (Appellant's Appendix pp. 64a-68a). It noted that the billing mechanism provided a unique means by which management may get its views in the hands of the ratepayers and that this conferred an undue advantage on management. Further, it noted the spacial limitations of the bill insert. The limitations, the Commission concluded, argued for restricting the use of bill inserts (Appellant's Appendix p. 66a) ". . . to convey information that is clearly helpful to consumers, such as practical steps that individuals can take to conserve energy. . . ." Finally, the Commission addressed the Constitutional free speech aspect of its ruling, stating (Appellant's Appendix p. 67a):

> . . . [I]t does not contravene the utilities' rights of free speech or press. Utility bill inserts are not newspapers which, in principle, any person is free to publish and thereby make his opinions known to the public. The privilege to disseminate utility bill inserts derives from the privilege of franchised monopoly, conferred by the government. It can, therefore, be regulated by the government to assure that it is exercised in the public interest.
>
> We have not, of course, prohibited the utilities from expressing their corporate opinions on controversial public policy issues in any other media. They are free, like all other members of our society, to explain their positions on radio and television interviews, to seek to

purchase space in newspapers, and to speak before public gatherings. For these kinds of communications, we merely require that the companies, rather than their customers, bear the costs.

The goal of free speech and of a free press is a well-informed electorate capable of making sound public policy decisions. Our ruling does not diminish to any substantial degree the utilities' ability to contribute to that goal. It does, however, preclude their monopolizing the unique utility bill insert medium.[1]

---

[1] We note also that where the ratepayer's bill is accompanied by political advertisement, the political material is, absent allocation, getting a free ride; the utility is deriving the economic benefit of postage, envelope, labor and overhead involved in the billing process. And even if an allocation of the expenses could be made, the actual cost of enclosing such material in the bill itself does not approach the one-sided benefit to the management of being able to use the unique billing process in presenting its side of the controversy. It is certainly questionable whether ratepayers should be compelled to support views with which they do not agree. See *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

As a final matter, the Commission considered (Appellant's Appendix p. 68a) the question of whether its standard of "controversial matters of public policy" was too vague. It decided that it was not, but did agree to provide prompt advisory rulings, if requested, on whether specific subjects came within its ban.

Consolidated Edison thereafter commenced a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules to review the Commission's determination. The litigation concluded in a judgment by the New York Court of Appeals upholding the Commission (Appellant's Appendix pp. 29a-30a). In its decision (Appellant's Appendix pp. 1a-15a), the Court of Appeals found first that the Commission had adequate statutory authority for its order and then held that the order was not barred by the First Amendment.

Prior to Consolidated Edison's state court proceeding, Long Island Lighting Company had commenced a suit to challenge the Commission's order in the Eastern District of New York. That case, *Long Island Lighting Company v. Public Service Commission* (77 Civ. 972), has been decided by District Judge George C. Pratt. By Judgment dated March 30, 1979 Judge Pratt granted the Commission a declaratory judgment that its bill insert order ". . . does not infringe plaintiff LONG ISLAND LIGHTING COMPANY's rights under the first and fourteenth amendments to the United States Constitution." A copy of the portion of Judge Pratt's decision dated March 30, 1979 dealing with the Commission's bill insert order is appended to this Motion. The case is now on appeal to the United States Court of Appeals for the Second Circuit.

ARGUMENT

Consolidated Edison argues (Jurisdictional Statement pp. 9-29), as it did in the Courts below, abstract principles of constitutional law and ignores the circumstances of this case, circumstances which fully justify the conclusion of both the New York Court of Appeals and Judge Pratt that the Commission's order is a permissible regulation of Consolidated Edison's free speech. The ban is in accord with decisions of this Court and raises no issues requiring plenary examination.

I. The Commission's Bill Insert Regulation Is A Permissible Restriction Of Consolidated Edison's Speech.

A. The Regulation Is A Subject Matter Restriction Frequently Permitted By This Court.

The New York Court of Appeals considered the Commission's order to be closely akin to a traditional time, place and manner restriction frequently permitted by this Court.

See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976) where the Court noted that: ". . . [w]e have often approved restrictions of that kind [time, place and manner] provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information. . . ." [Citations omitted].[1]

The New York Court of Appeals concluded that the Commission's ban met the tests required for a time, place and manner restriction. It found (Appellant's Appendix pp. 9a-11a) that (1). ". . . there is no doubt but that the regulation leaves open numerous alternative means of communication . . ."; (2). ". . . the ban unquestionably fosters an important governmental interest . . ." and; (3). ". . . that the regulation, properly viewed, is not content orientated . . ."

The Court realized that the ban was defined by reference to the subject matter of bill inserts, *i.e.*, controversial matters of public policy, however, it found:

[1] This Court has approved a similar test in *United States v. O'Brien,* 391 U.S. 367, 377 (1968), where it upheld O'Brien's conviction for burning his draft card:

> . . . [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest . . ..

Here as in *O'Brien,* the Commission's prohibition relates to both speech and non-speech elements. The Commission is only secondarily concerned with the subject matter of Consolidated Edison's communications; the focus of the Commission's concern is primarily the means used to accomplish it.

> . . . [I]t does not discriminate against persons of any particular political stripe or prohibit the expression of any one position on a hotly debated issue. In short, the restriction endeavors, in an objective and evenhanded manner, to limit billing insert materials to the innocuous and noncontroversial. Given these circumstances, where the communication intrudes upon the privacy of the home, such a limitation does not offend the First Amendment (*Erznoznik v. City of Jacksonville,* 422 US 205, 209; see *Greer v. Spock,* 424 US 828, 838-839; *Lehman v. City of Shaker Heights,* 418 US 298, 302-304; see, Tribe, American Constitutional Law, § 12-21, at pp. 690-691, & n 21).

In a similar vein, Judge Pratt also concluded (Appellee's Appendix pp. 31-40) that the Commission's ban was akin to a time, place and manner restriction, finding that it leaves open ample alternative channels of communication and fulfills important governmental interests. Judge Pratt gave considerable attention to the "contents" aspect of the Commission's order. In a lengthy analysis of this Court's decision in *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974), Judge Pratt noted that the Court had upheld a content-based restriction when allowing the City of Shaker Heights to refuse political advertising in vehicles of the city transit system. He concluded that there were even more reasons in the present case for a ban than there were for the one upheld by this Court in *Lehman.*

We believe that the ban is, in the traditional sense of the terms, neither content-neutral nor content-based. Rather, the regulation is a subject matter restriction unrelated to any attempt by the Commission to foster or deter a particular point of view.[2]

[2] For an extended discussion of cases involving subject matter restrictions, *see "Stone, Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions,* 46 Chic. L. Rev. 81 (1978)".

The neutrality of the Commission's ban distinguishes it from cases where the government has attempted to foster or suppress a specific point of view or particular information. (*See, e.g., Miller v. California,* 413 U.S. 15 (1973) (banning obscenity); *Dennis v. United States,* 341 U.S. 494 (1951) (forbidding advocacy of violent overthrow of the government); *Landmark Communications v. Virginia,* 435 U.S. 829 (1978) (disclosure or publication of specified information)).

Subject matter restrictions have been upheld by this Court where necessary to achieve important state interests. A foremost example is *Lehman v. City of Shaker Heights, supra.* Other examples include *Greer v. Spock,* 424 U.S. 828 (1976) (involving a ban on political campaigning on a military base) *Young v. American Mini Theaters, Inc.,* 427 U.S. 50 (1976) (upholding Detroit's zoning ordinance limiting density of theaters showing sexually explicit but not obscene films), and *Rowan v. United States Post Office Dept.,* 397 U.S. 728 (1970) (upholding a statute permitting mail recipients to refuse lewd or offensive materials through the mail). The Commission's ban should similarly be upheld especially since it poses only a minimal burden on Consolidated Edison's speech and fulfills important governmental interests.

Consolidated Edison argues (Jurisdictional Statement pp. 14-18) that the Court of Appeals erred in concluding that the bill insert ban is not content based. After discussing cases involving time, place and manner restrictions, Consolidated Edison argues that under the approach of the New York Court of Appeals (Jurisdictional Statement p. 16) ". . .the State may suppress debate on all public issues, so long as the prohibition is applied in an 'evenhanded manner'. . . ." Of course, that argument has no relationship to this case where the utility's management may exercise its right to speak out on controversial issues in fora other than bill inserts. Consolidated Edison's argument is totally belied by the very nature of the Commission's bill insert ban. There simply has been no attempt on the part of the Commission to suppress free speech by utilities.

Consolidated Edison's only attempt to distinguish this Court's decisions upholding subject matter restrictions (Jurisdictional Statement p. 16, footnote 12) (Consolidated Edison mentions only two, *Greer, supra,* and *Lehman, supra*) is that the speakers in those cases were attempting to obtain access to the government's property to exercise free speech rights while, in this case, the Commission's order prevents the use by Consolidated Edison of its own property for First Amendment purposes. This Court drew no public property—private property distinction in its decisions in *Greer* and *Lehman*. Nevertheless, as we discuss below, the issue in this case is not the prevention of the use of Consolidated Edison's property but, rather, the use to be made of the utility billing process which the ratepayers are required to support. Consolidated Edison's discussion of the subject matter restriction cases (Jurisdictional Statement pp. 16-17) amounts more to a recitation of law review articles critical of this Court's decisions than an argument that the decisions are inapplicable to the case at hand and failed to support the decision of the court below. Consolidated Edison has not shown that the Court of Appeals, insofar as it concluded that the Commission's ban was a permissible subject matter restriction, was incorrect. To the contrary, the prior decisions of this Court demonstrate the correctness of the Court of Appeal's conclusion.[3]

[3] As a final thought, Consolidated Edison also argues (Jurisdictional Statement p. 18) that the Court of Appeals was incorrect in concluding that the Commission's ban did not prohibit expression of only one position on hotly debated issues. The company notes that the ban applies to the

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B. The Order Imposes Only A Minimal Burden On Consolidated Edison.

The Commission's ban relates to only one form of communication—bill inserts (messages enclosed with service bills). Consolidated Edison and all other utilities are not prohibited from using alternative means of communication. The Commission stressed (Appellant's Appendix p. 67a):

> We have not, of course, prohibited the utilities from expressing their corporate opinions on controversial public policy issues in any other media. They are free, like all other members of our society, to explain their positions on radio and television interviews, to seek to purchase space in newspapers, and to speak before public gatherings. . . .

There can be no question that the New York Court of Appeals and Judge Pratt were correct in concluding that the ban leaves open ample alternative channels for communication.

The Court of Appeals' decision, concluding that there are ample alternative channels for communication, is in no way in conflict with this Court's determination in *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977). That case involved the placement of "for sale" signs in front of residential property. The Court determined that the ban-

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dissemination of the "utility's position" on controversial matters of public policy. This argument, of course, completely misses the point. The prohibition is addressed to the use of bill inserts by utility management since those are the only parties who would otherwise be able to use the billing process to disseminate their positions. It is disingenuous for Consolidated Edison to argue that the Commission's ban is unevenhandedly applied since the company has refused to allow other parties to use the billing process to disseminate their views. In fact, the company's refusal to allow the NRDC and other antinuclear proponents to use the billing mechanism prompted the complaint which led to the Commission's investigation resulting in its order to ban bill inserts.

ning of the "for sale" signs did not fulfill the governmental interest sought to be advanced by the ordinance, *i.e.*, stabilization of racially integrated housing. It found, however, that the ordinance would impede the ability of sellers of homes to communicate the information to the audience most interested in it, potential buyers.

In this case, not only does the regulation fulfill important state interests, there is also no realistic evidence that Consolidated Edison has been deprived of the cheapest means of communication. Consolidated Edison's argument (Jurisdictional Statement p. 29) that it has been foreclosed from the most economic means of disseminating its information rests upon the totally unjustified assumption that only out-of-pocket or incremental costs of producing bill inserts will be assigned to the utility's shareholders.[4] It assumes that utility ratepayers may properly be required to contribute the costs of postage, envelopes, assembling the computerized mailing lists and all other expenses associated with the billing process so that its management may use this ratepayer-financed facility to provide a free ride for the dissemination of its management's views. As we discuss *infra*, this Court has determined that persons are not entitled to a subsidy from others in order to express their views. This, was one of the important state interests sought to be achieved by the Commission in instituting its bill insert order.

C. The Regulation Fulfills Important State Interests.

The Commission's order achieves several important state interests all of which are ignored or misconstrued by Consolidated Edison in its Jurisdictional Statement (pp. 19-27).

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[4] In any event, Consolidated Edison is not constitutionally entitled to use the easiest and cheapest way to communicate. (*Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Adderley v. Florida*, 385 U.S. 39 (1966); *Kovacs v. Cooper*, 336 U.S. 77 (1949).)

The Commission's order relates to materials sent with utility bills. Consolidated Edison, of course, has the ability to bill most of the residents in its service area only because it is a franchised monopoly having the right to serve most of New York City and a portion of Westchester County. No other utility may legally offer service in competition with Consolidated Edison. One of the necessary adjuncts of providing utility service is the billing function which enables the utility to receive payment for services rendered. Since the billing process is a part of providing utility service, Consolidated Edison is legally entitled to receive rates designed to pay for it (New York State Public Service Law, § 66). Therefore, a portion of each ratepayer's utility rates pays for the cost of the billing. Consolidated Edison, however, used the billing process, paid for by the ratepayers (in January 1976), for a nonutility purpose—a vehicle to provide a free ride for inserts concerning its management's views on nuclear power.

Confronted with this background, the Commission raised several concerns which it believed required closing the billing packet to utility service related messages. A primary concern (Appellant's Appendix p. 43a, pp. 65a - 66a) was that the billing packet be used to provide information on utility service of aid to consumers, including energy conservation suggestions, safety tips and complaint procedures. The Commission relatedly concluded (Appellant's Appendix p. 43a) that it was unfair to the ratepayers who pay for the billing process to be forced to contribute to the dissemination of information not directly related to their utility service.

The Commission also expressed several other concerns. First, the billing packet is limited in capacity so that use for political issues might displace service-related information. If use of the packet for such purposes were allowed, it would require regulation in a manner analogous to the Federal Communications Commission's regulation of limited spectrum

space to assure that radio and television stations act as trustees of the public interest (Appellant's Appendix p. 66a). There, the FCC has acted both to preserve limited capacity and to assure that the airwaves are not used for only one-sided discussions of public issues. Similarly, the use of the billing process for controversial issues may create a public forum which would require opening the billing packet to opposing points of view (Appellant's Appendix pp. 66a - 67a). This would both aggravate the limited space problem and create enormous difficulties in administering the forum fairly. Second, if utility managements are able to use the billing process for mailing controversial inserts, the utilities will be receiving a free ride on the ratepayers who pay the embedded costs associated with the mailing (Appellant's Appendix p. 67a). Third, utility ratepayers are a captive audience who have no choice but to receive monthly bills (Appellant's Appendix p. 43a). Fourth, it would be impossible to make a meaningful cost allocation between shareholders and ratepayers that would eliminate the problem of providing a subsidy to utility management.

Consolidated Edison's Jurisdictional Statement totally fails to address the matters that provided the basis for the Commission's ban. The New York Court of Appeals took cognizance of these important state interests in determining that the Commission had jurisdiction over bill inserts (Appellant's Appendix pp. 6a - 7a), as well as when it determined that the Commission's ban did not abridge First Amendment rights (Appellant's Appendix, p. 10a). These interests were further discussed by the New York Supreme Court, Appellate Division Third Department in its decision upholding the bill insert order (Appellant's Appendix pp. 18a - 19a). The state interests were also carefully analyzed by Judge Pratt when he compared the Commission's ban on bill inserts to the ban on political advertising upheld by this Court in *Lehman, supra* (Appellee's Appendix pp. 34-40).

Consolidated Edison argues (Jurisdictional Statement pp. 19-23) that the regulation does not accomplish its purpose. Its argument, however, is premised upon either a misunderstand-

ing or a misconstruction of the order's intent. The order is not designed to protect "utility customers from receiving 'offensive' materials", from any source other than the utility billing process which should be limited to matters directly relating to utility service. Since the ban is not designed to prohibit the mailing of all "offensive materials", Consolidated Edison's argument that it does not accomplish this purpose is, of course, correct, but irrelevant. The Court of Appeals, of course, did not find that the Commission's ban would protect ratepayers from the receipt of offensive materials other than bill inserts. Similarly, the company's discussion concerning the authority of the government to regulate mail communication to shield persons from offensive views is also irrelevant to the case at hand. Consolidated Edison also argues that the ban is ineffective because it can mail the same materials to utility customers in a separate mailing that it is prohibited from mailing in the utility billing envelope. This argument only demonstrates that the Commission's ban does leave open ample alternative channels for communication. The Commission has done nothing to prohibit a utility company from expressing its views on controversial matters of public policy as long as it is not done by means of the ratepayer-financed billing mechanism.

Consolidated Edison also seeks to interject the question (Jurisdictional Statement pp. 23-27) of a conflict between First Amendment rights of entities to disseminate views by bill inserts and the privacy rights of unwilling recipients. However, this case does not raise that question at all. This case amounts to no more than a regulation of the utility billing process to assure that it is used for the purposes intended, namely, the billing of customers for utility service and the rendition of messages relating to useful consumer information. Utility customers are paying for the billing process

and it should be used only to serve them and for no other purpose. This is the basis of the Commission's bill insert ban recognized by both the New York Court of Appeals and Judge Pratt. This Court should not be misled by Consolidated Edison's irrelevant and erroneous contentions that the case presents novel issues concerning censorship of the mail.

D. The Order Assures That Ratepayers Are Not Forced To Subsidize The Views Of Utility Management In Violation Of This Court's Decisions.

One of the reasons for the Commission's bill insert regulation is to assure that utility customers are not forced, through their payments of monthly bills, to subsidize the dissemination of utility managements' views. Since ratepayers pay for the cost of the billing process as part of their monthly utility payments, they will also be paying for the postage, envelopes, etc. associated with the billing process which, absent the Commission's regulation, may be used by utility management for its own purposes and not just for matters directly relating to utility service. Consolidated Edison assumes (Jurisdictional Statement p. 29) that it is entitled to use the billing process while paying only for the incremental costs of producing the political bill insert to be enclosed with the mailing. If the Commission were to permit this, the utility management would clearly have a free ride on the ratepayers, since the bulk of the cost of the mailing process would be paid for through their forced contributions.[5]

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[5] Of course, varying cost allocations are possible. For example the Commission might direct that up to 50% of the costs of the billing process be allocated to the utilities' shareholders if the bill contained a political insert since the mailing was being used on a joint-use basis for both utility and nonutility purposes. If costs of this magnitude were assigned to management, the economy of using the billing process for advertising would be far different from that assumed by Consolidated Edison. For example, according to the evidence submitted by Consolidated Edison, an allocation of

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This Court has held that one cannot be compelled to contribute to the cost of publicizing another's views. For example, the Court found that union members may constitutionally prevent unions from spending a part of the members' required service fees to contribute to political candidates and express political views unrelated to their duties as exclusive bargaining representatives. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). As with the union members in *Abood*, Consolidated Edison's ratepayers will be compelled to subsidize the dissemination of political views unless the billing process is closed for those purposes.[6] *See also, Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956); *Elrod v. Burns*, 427 U.S. 347 (1976). Similarly, the Court upheld the checkoff system for taxpayer contributions to presidential elections only after noting that "[t]he scheme involves no compulsion upon individuals to finance the dissemination of ideas with which they disagree. . . ." *Buckley v. Valeo*, 424 U.S. 1, 91, n 124 (1976).

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one-half of the postage cost in the case of a mailing would be over $175,000 for one first class mailing alone (Record below, p. 113). This would be far more expensive than running a message four times in local newspapers (Record below, p. 115).

It is not reasonable to assume, however, that the Commission can make a realistic cost allocation. The Commission specifically declined to do so (Appellant's Appendix p. 67a). Indeed, in light of the spacial limitations of the bill insert and the ability of utility management to pick and choose which messages are to be sent along with monthly bills, it would be impossible for the Commission to determine whether service-related messages had been deleted in order to open space for management's political messages.

[6] While a ratepayer's bill will not be higher if Consolidated Edison gets a free ride, the ratepayer will still be compelled to subsidize the billing process, a forced subsidy found impermissible in *Abood*.

The First Amendment, far from compelling the subsidization of other's views, prohibits forced contributions to political discussions. The Commission, therefore, not only failed to abridge Consolidated Edison's First Amendment rights, but it also acted to protect the rights of the company's ratepayers.

II. The Commission's Order Is Sufficiently Specific.

Consolidated Edison also argues (Jurisdictional Statement pp. 30-31) that the Commission's bill insert ban is unconstitutionally vague. This contention was rejected both by the New York Court of Appeals and by Judge Pratt of the Eastern District who set forth in detail (Appellee's Appendix pp. 26-31) the reasons for his rejection of that contention.

The standard in the Commission's order "controversial matters of public policy" is specific and provides guidance to utilities as to matters not to be enclosed in bill inserts. Thus far, the Commission has only had occasion to consider two issues with respect to its ban (Appellant's Appendix p. 68a); the current debate concerning the development of nuclear power and questions concerning the merits of public versus private ownership of electric utilities. In the more than two years since the Commission's ban has been in effect, there have been no problems concerning its implementation. The Commission's standard is in keeping with its longstanding Uniform System of Accounts which provides for allocation of political expenses to utility shareholders.[7]

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[7] Account 426.4 Expenditures for Certain Civic, Political and Related Activities, provides:

> This account shall include expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation or ordinances (either with respect to the possible adoption of new referenda, legislation or ordinances or

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In addition, the Commission's standard is virtually identical to that upheld by this Court in *Red Lion Broadcasting v. F.C.C.*, 395 U.S. 367, 395-396 (1969). In that case, the Court rejected a challenge to the Federal Communications Commission's fairness doctrine finding that the standard used by the FCC, "controversial issues of public importance," was not unconstitutionally vague. Furthermore, in *Abood, supra,* this Court noted (431 U.S. 240, n 41) that the union had adopted, as a corrective measure, an accounting procedure allowing a dissenting employee to protest the expenditure of his agency shop fee for " '. . . activities or causes of a political nature or involving controversial issues of public importance only incidentally related to wages, hours, and conditions of employment. . . .' " This Court expressed no concern with the standard adopted by the union.

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repeal or modification of existing referenda, legislation or ordinances) or approval, modification or revocation of franchises; or for the purpose of influencing the decisions of public officials or advancing the political objective of the utility, but shall not include such expenditures which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility's existing or proposed operations.

Conclusion

For the above reasons, this appeal should be dismissed or the decision of the New York Court of Appeals summarily affirmed.

Respectfully submitted,

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August 24, 1979

APPENDIX

Opinion Of The United States District Court, Eastern District of New York, Dated March 30, 1979 in *Long Island Lighting Company v. The New York State Public Service Commission*

V. *PSC's BAN ON CONTROVERSIAL BILL INSERTS*

A. *Factual Background.*

In order to publicize its belief that "nuclear generated power is the most economical, efficient and socially desirable method of meeting Long Island's need for increased energy", Plaintiff's memorandum at 22, LILCO has at times communicated its views about nuclear power to its customers through the use of bill inserts. LILCO believes that such inserts provide a significant medium for efficiently communicating with its customers at reasonable cost.

There is no claim that LILCO's bill inserts have been false or defamatory, nor is there any dispute that such communications on nuclear power are political in nature, that they must be paid for solely by LILCO shareholders, and that their out-of-pocket costs may not be considered an expense of doing business for rate making purposes.

PSC's ban on the use of such bill inserts had its origin in a complaint filed with PSC by the Natural Resources Defense Council, Inc. one of the intervenors in this case, which sought redress for a similar 1976 Con Edison bill insert that discussed the need for nuclear power development. After investigation and hearing, PSC determined that bill inserts should not be used to express the opinion of management on "controversial issues of public policy".

In the lengthy policy statement issued on February 25, 1977, PSC explained its reasoning. After summarizing its long-standing position that ratepayers should not bear the expense of advertising which states a utility's position on a matter of

public controversy, PSC concluded that such advertising would not be permitted to be included as a bill insert, even when the stockholder pays for it in full. PSC summarized its position as follows:

> Further, we shall not permit advertising on matters of public controversy to be included in the printed material that often accompanies the mailing of consumer bills. We believe that using bill inserts to proclaim a utility's view point on controversial issues (even when the stockholder pays for it in full) is tantamount to taking advantage of a captive audience, since the consumer cannot avoid receiving the literature with the utility's message. Regardless of whether consumers read the material, it is basically unfair to subject ratepayers who disagree with the utility's viewpoint to the arguments of the utility through its billing mechanism. A utility company's mailing list provides an available conduit for the easy dissemination of information, which should be used for the benefit of both the consumer and the company to convey noncontroversial and useful information that will create a better informed public. It should not become a vehicle for dissemination only of the company's views on controversial matters of public policy. Accordingly, we will not permit bill inserts to be used by utility companies for the purpose of advertising their opinions or viewpoints on controversial issues of public policy. 1977 Policy Statement at 10-11.

When PSC issued its order denying the petitions of various utilities for rehearing, it considered in greater detail the bill insert restriction in light of the utilities' first amendment contentions. It pointed out that it had not prohibited the companies from making their views known, that use of the bill insert to publicize a utility's views on matters of public controversy was in PSC's judgment improper "since it gives a utility a unique and undue advantage in publicizing its position" to a "selectively chosen target audience", that "the unique advantage * * * is then transformed into a device for

presenting only one side of this issue", and that this confers "an unreasonable advantage on management that unduly discriminates against others who may not share or who oppose the company's views". PSC Order Denying Rehearing, at 6 (July 14, 1977). PSC also focused on the limitations inherent in this "unique medium of communications". Its size and weight should not be so great as to require additional postage, and it can be mailed only once a month, and in many cases, only once every other month.

In PSC's view, bill inserts should be used "*primarily* to convey information that is clearly helpful to consumers" (emphasis supplied), and the prohibition is aimed at preserving that "public interest objective". Moreover, according to PSC, no one else can obtain the "wide captive audience for bill inserts" that is enjoyed by utilities having monopoly franchises conferred by the government. In its view, this aspect makes the utility bill insert medium analogous to the limited spectrum space available for radio and television broadcasting, a consideration that leads to problems of "fairness" and equal time so as to permit organizations with opposing viewpoints an opportunity to disseminate their opinions as inserts in the utility's bill. *Id.* at 7-8. After considering that approach, all PSC members were convinced ultimately "that it would be difficult to administer fairly, and would tend to lessen undesirably the number of bill inserts dealing directly with such useful and uncontroversial information as consumer conservation measures." *Id.* at 8. PSC also noted that the privilege to disseminate utility bill inserts derives from the privilege of franchise monopoly conferred by the government, and that it can, therefore, be regulated by the government to assure that it is exercised in the public interest.

Solely for the purpose of the summary judgment motion, LILCO has assumed certain facts to be established: (1) that LILCO derives an intangible benefit from the distribution of bill inserts discussing its views on controversial issues, although it contends that no consumer incurs any out-of-pocket expenses attributable to the bill insert program, and, (2) that alternative means of communication, such as newspaper advertising, are available at comparable cost, but that in management's opinion, such alternative means are not as effective a form of expression.[2]

PSC and intervenors argue that there is a factual dispute as to whether LILCO's customers (the ratepayers) are forced to subsidize political views with which they disagree, or in other words, whether all the costs of bill inserts containing political advertising can realistically be allocated between LILCO's ratepayers and shareholders. PSC claims that cost allocation is difficult for three reasons: first, since bill envelopes are limited in size LILCO would have less space to provide for information related to utility services or energy conservation tips if it provided more space for political messages; second, since the determination of rates is based on past expenses and anticipated increases, LILCO might prevent a loss of earnings stemming from cost allocation of political advertising, by simply spending less on customer service; finally, since rates are also set to insure profits for capital formation, a loss in LILCO's earnings due to cost allocation of political advertising expenses (including such advertising in bill inserts) could be made up by increasing electric rates in order to bring in sufficient income to raise the necessary capital. These arguments about cost allocation, however, are irrelevant to PSC's ban on controversial bill inserts, which was to apply "even when the stockholder pays for it in full." 1977 Policy Statement at 10.

Moreover, PSC has presented no facts to support its contention that, contrary to LILCO's position, costs cannot be allocated between ratepayers and shareholders. See *SEC v. Research Automation Corporation et al.*, 585 F2d 31, 33 (CA2 1978). Indeed, it seems inequitable for PSC to allege a factual dispute that is the result of its own admitted failure to formulate a cost allocation scheme for bill inserts. Nor have intervenors alleged facts to indicate that a fair cost allocation is impossible. On the other hand, LILCO's contention that cost allocation is feasible, is supported by facts. During a three month period in 1977, LILCO employees kept time sheets to determine the extent to which they were engaged in the bill insert process, LILCO's 9(g) Statement, Part B, ¶25; a list of hours and allocated salaries, as well as the cost of single sheet and more elaborate bill inserts discussing nuclear power, is also provided. LILCO 9(g) Statement, Part B, ¶¶25-26. From these it appears feasible for PSC to allocate the costs of a bill insert so that they may be attributed solely to LILCO's shareholders, and not to its ratepayers.

On the issue of whether bill insert costs can be apportioned, different methods of allocation are possible. One approach would be to charge the shareholders any additional costs of the inserts over and above the costs of mailing the bills to the ratepayers. Another would be just the reverse, that is to charge to the shareholders the full cost of mailing the inserts and envelopes and only incremental costs to the ratepayers for including the bills. A third would be to prorate the costs of the single mailing between the bill and the insert on a basis of space, number of words, or other reasonable manner. In any event, the problem is administrative, not constitutional.

Whatever allocation method might be used, however, to the extent that the cost of an insert is less than the cost of a

separate mailing of the same insert, it would represent a benefit or "free ride" to shareholders which had been paid for by ratepayers. Moreover, LILCO concedes that with any method of allocation there would be an intangible benefit from using bill inserts arising out of its access to a prepared mailing list and access to an existing bill stuffing and mailing system.

B. *Discussion.*

1. *LILCO and its advocacy of nuclear power are both entitled to some first amendment protection.*

In *First National Bank v. Bellotti, supra,* the Supreme Court ruled that corporate speech is entitled to first amendment protection, even when such speech deals with matters unrelated to the corporation's business interests. The thrust of the decision was that in the free discussion of governmental affairs, the nature of the speaker is not constitutionally significant and does not call into question different first amendment considerations. The Court noted that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source, whether corporation, association, union, or individual." *Id.*, 98 SCt at 1416.

LILCO argues that the purpose of its communications on nuclear power is to inform customers of the advantages of that form of energy and to reassure customers on management's judgment in pursuing the development of nuclear power. The bill inserts prohibited by PSC seek to discuss the merits of nuclear energy, a matter of current debate and divergent opinions. LILCO's proposed construction of nuclear power plants on Long Island is an issue seriously affecting both individual and community interests; since opponents of nuclear energy have campaigned against

the building of such facilities, the controversy has received substantial media attention. Even though LILCO may stand to gain commercially from completion of the nuclear plants, the information it seeks to disseminate is essentially political, and "[s]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 US 64, 78 (1964).

It is clear, then, that debate on nuclear power is the type of speech the first amendment was designed to protect, see *Bellotti, supra*, 98 SCt at 1415, and that LILCO's interest in expressing itself on that issue is entitled to first amendment protection. It remains to be determined whether PSC's prohibition of bill inserts as a vehicle for LILCO's expression on a controversial issue such as nuclear power is an unconstitutional infringement of LILCO's first amendment rights of expression.

2. *PSC's ban is not unconstitutionally vague.*

LILCO argues that the ban on controversial issues of public policy in bill inserts is unconstitutional because it is vague. The court does not agree. LILCO contends that the alleged vagueness of the PSC ban raises three problems of constitutional dimension: (1) the ban fails to give adequate notice of the scope of its proscription; (2) the ban has a chilling effect on the exercise of first amendment rights; and (3) the ban vests overbroad discretion in PSC to regulate the content of proposed communications.[3]

Under PSC guidelines, a public utility's expenditures for political advertising are recorded in a special "below-the-line" account, number 426.4, which excludes them from consideration as business expenses in the rate making process, thus placing their burden on shareholders rather than ratepayers.[4]

PSC interprets this special cost-allocation account to include

> All advertising which seeks to sway opinion—legislative, environmental, governmental, consumer or any other kind—to the industry's position on public policy disputes.
>
> 1977 Policy Statement at 10.

PSC has also stated that it would "include in this category expenses incurred in the preparation of materials designed to influence public opinion in the current debate concerning the development of nuclear power." *Id.* The account has existed for some time; it has been the subject of various state court and regulatory decisions interpreting what is meant by "political advertising"; and LILCO has indicated that it will continue to cooperate with the PSC cost-allocation guidelines for Account 426.4. Therefore, since the "controversial issues of public policy" now barred by PSC from bill inserts are those matters whose expenses would ordinarily be recorded in Account 426.4 as political advertising, PSC argues that some guidance does exist for utilities to follow in determining whether or not a particular bill insert falls into the proscribed category.

In its decision denying reconsideration of the policy statement, PSC considered the vagueness argument directly:

> The petitioners * * * argue that the term "controversial issues of public policy" is too vague and does not give them any clear standards by which to judge the content of their bill inserts.
>
> In the [cost-allocation] Guidelines, we discussed the various types of materials that would fall within our proscription. These Guidelines are admittedly general but we expect to give them greater definition through

future advisory determinations. One such determination was made in our Policy Statement where we specifically included in this category expenses incurred in the preparation of materials designed to influence opinion in the current debate concerning the development of nuclear power. In its petition here, Con Edison requested a determination as to whether materials prepared in response to the demand by several elected officials for public operation of its facilities falls within the political category. We believe that it does and, therefore, should not be included as a bill insert. In the event a utility wishes additional guidance with respect to this matter, it should feel free to ask it. We will resolve any request expeditiously so that no undue delay will result.

Order Denying Petitions for Rehearing, *supra* at 8-9.

The Supreme Court has stated that:

> [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.
>
> *Connolly v. General Construction Company,* 269 US 385, 391 (1926).

In the context of the first amendment, the Court has further stated:

> We emphasize once again that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms ***"; "[f]or standards of permissible statutory vagueness are strict in the area of free expression. *** Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." ***

> When one must guess what conduct or utterance may lose him his position, one necessarily will "steer far wider of the unlawful zone ***." *** For "[t]he threat of sanctions may deter *** almost as potently as the actual application of sanctions."
>
> *Keyishian v. Board of Regents,* 385 US 589, 603-04 (1967) (citations omitted).

The Supreme Court thus requires "more specificity of a statute potentially applicable to expression sheltered by the first amendment than in other contexts ***." Laurence H. Tribe, *American Constitutional Law* 719 (1978). In *Smith v. Goguen,* 415 US 566 (1974), where the Court invalidated as being unconstitutionally vague, a state provision punishing "contemptuous" treatment of the American flag, the Court noted that "[w]here a statute's literal scope *** is capable of reaching expression sheltered by the First Amendment, the [due process/vagueness] doctrine demands a greater degree of specificity than in other contexts." *Id.* at 573. See also *Grayned v. City of Rockford,* 408 US 104, 108-09 (1972); *Papachristou v. City of Jacksonville,* 405 US 156, 162 (1972); *Lanzetta v. New Jersey,* 306 US 451, 453 (1939).

Even under these high standards it does not appear that the PSC's exclusion of "controversial issues of public policy" from bill inserts is unconstitutionally vague. In context the phrase is synonym for the "political advertising" for which expenditures are recorded in Account 426.4. Interpretation of what is "controversial" or "non-controversial" may be governed by those considerations which determine expenditures recorded in that account. PSC has already had some expertise, and the public utilities some guidance, on what matters are considered "political" and thus subject to recording in Account 426.4; these interpretations may similarly be used as guidelines in determining what is or is not controversial".

LILCO also cites *First National Bank v. Bellotti, supra,* to support its vagueness argument. There the Supreme Court found unconstitutional a Massachusetts statute barring corporations from making expenditures designed to influence referenda on questions other than those "materially affecting" the property, business, or assets of the corporation. Justice Powell discussed the vague and deterrent effect of the statute's "materially affecting" standard:

> Even assuming that the rationale behind the materially affecting requirement itself were unobjectionable, the limitation in [the statute] would have an impermissibly restraining effect on protected speech. Much valuable information which a corporation might be able to provide would remain unpublished because corporate management would not be willing to risk the substantial criminal penalties—personal as well as corporate—provided for in [the statute]. *** As the facts in this case illustrate, management could never be sure whether a court would disagree with its judgment as to the effect upon the corporation's business of a particular referendum issue.

Id., 98 SCt at 1420, n. 21 (citations omitted).

LILCO argues that the "controversial issues of public policy" standard used in the PSC ban is even more subjective and amorphous than *Bellotti's* "materially affecting" standard. *Bellotti,* however, is readily distinguishable. The rejected standard of the Massachusetts statute had no prior history of interpretation or guidance from court or administrative opinions, whereas the language adopted by the PSC closely parallels the standard of political advertising attributable to Account 426.4, which does have a history of prior interpretation.

Moreover, as an administrative regulation the PSC restriction lacks the chilling impact of the potential jail sentence imposed by the Massachusetts statute. It even bears the promise of the PSC to "expeditiously" resolve in advance any doubt about a particular proposed bill insert. Although the delay caused by even an expeditious administrative review might under some circumstances chill speech sufficiently to render the regulation unconstitutional, that is not the case here, where the affected speech lacks spontaneity and is prepared for inclusion in the monthly billing envelope.

Thus, the ban is not unconstitutional on grounds of vagueness.

3. *PSC's ban does not otherwise infringe LILCO's first amendment rights.*

In its order denying rehearing, PSC stated:

> We have not, of course, prohibited the utilities from expressing their corporate opinions on controversial public policy issues in any other media. They are free, like all other members of our society, to explain their positions on radio and television interviews, to seek to purchase space in newspapers, and to speak before public gatherings. For these kinds of communications, we merely require that the companies, rather than their customers, bear the costs.

Order Denying Petitions for Rehearing, *supra* at 10.

Thus, PSC's order is not an absolute ban but rahter, a restriction on one method of communication, a distinction that the Supreme Court has stated "is not without significance to First Amendment analysis since laws regulating the time, place or manner of speech stand on a different footing than laws prohibiting speech altogether." *Linmark v. Township of Willingborough, supra,* 431 US at 93.

The Supreme Court has

> *** often approved [time, place, or manner restrictions] provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information.
>
> *Virginia State Board v. Virginia Citizens, supra,* 425 US at 771.

See also *Grayned v. City of Rockford, supra,* 408 US at 115-17; *Buckley v. Valeo,* 424 US 1, 17-18 (1976).

However, PSC's prohibition against using bill inserts to express management's views on "controversial issues of public policy" does not fit nicely into the category of a time, place, or manner restriction. As *Virginia State Board, supra* teaches, three tests must be met before speech may be restricted under that analysis. Two are clearly met here; but the analysis breaks down on the third.

One test that is clearly met here is the requirement of ample alternative channels for communication. As already indicated, PSC has not prohibited utilities from urging nuclear power or other positions of a controversial nature; it has merely deprived them of the bill insert means for expounding their views. All other means of communicating with the public—newspaper advertisements, public speakers, or even house-to-house canvassing—are unaffected by the bill insert ban. Although LILCO may feel that no other approach is as effective or efficient as would be the use of bill inserts, the fact remains, nevertheless, that for communicating its views LILCO has available to it ample alternative channels, indeed all those channels that are available to virtually anyone else in our society who wishes to impress the public with a point of

view. LILCO, in other words, is surely no worse off than other would-be communicators.

The second test which has been met here is that the restriction serve a significant governmental interest. PSC best summarized its justifications at pages 6 to 8 of its July 14, 1977 Order Denying Petitions for Rehearing. There, PSC expressed its belief that permitting utilities to use bill inserts to discuss controversial issues would confer an undue advantage on management, and would interfere with the primary function of bill inserts, namely, to convey information that is clearly helpful to consumers. The types of information that PSC viewed to be properly distributed at ratepayers' expense, and therefore presumably appropriately includable in bill inserts, were elsewhere described by PSC as including

> appeals for the conservation of gas or electricity; notification of emergency conditions and procedures; instructions in the proper use of the equipment which makes use of the utility's service; information about new rates, new billing practices, or new inspection or meter reading schedules; advice concerning hazards associated with the utility's service; reports on matters of interest to the public concerning the utility's service—such as service difficulties and progress in overcoming them, projections of new capacity additions, plans for new or improved means of providing service, and the like.
>
> 1977 Policy Statement at 11.

PSC viewed the inserts as directed to a wide captive audience that must open the bill and be exposed to the inserts. From this, PSC reasoned that a degree of fairness or equal time for proponents of opposing views would have to be required and that this, in turn, would not only be difficult to administer fairly, but also would tend to lessen undesirably

the number of bill inserts dealing with such useful and uncontroversial information as consumer conservation measures. These are significant governmental interests properly to be weighed by PSC in regulating utilities.

The third test for a valid time, place, or manner restriction, however, is missing here, for it cannot be said that PSC's ban on use of bill inserts to express views on "controversial issues of public policy" is unrelated to the content of the regulated speech. Indeed, it is precisely because of content—controversial issues—that LILCO has been denied access to bill inserts as a medium for advocating nuclear power. The discussion does not end, however, just because the content of LILCO's speech causes its regulation, or because the PSC ban does not fit the classic mold of a time, place, or manner restriction. A content based restriction was upheld by the Supreme Court in *Lehman v. City of Shaker Heights*, 418 US 298 (1974), in which the Court affirmed a judgment of the Supreme Court of Ohio, that held there was no violation of Lehman's first and fourteenth amendment rights when the city refused to permit the display on vehicles of the city transit system of posters advertising Lehman's candidacy for public office. The city had acted under a policy which permitted commercial advertising on its vehicles, but prohibited any "political advertising". Under that policy the city had not accepted or permitted any "political or public issue advertising." Lehman urged in the Supreme Court that the car cards constituted a "public forum" entitled to first amendment protection regardless of their primary purpose.

Four justices disagreed with Lehman, distinguishing the advertising in public transit vehicles "from the traditional settings where First Amendment values inalterably prevail." 418 US at 302. Writing for the prevailing four, Justice Blackmun

noted that American constitutional jurisprudence has been jealous to "preserve access to *public places* for purposes of free speech," but he nevertheless reminded us that "the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the Amendment to the speech in question." *Id.* at 302-03 (emphasis supplied). Then, stressing the difference between car card space as an incidental aspect of public transportation and free speech in open spaces, in a meeting hall, in a park, on a street corner, or in a public thoroughfare, he turned his attention to whether the city's policies and practices governing access to the transit system's advertising space were arbitrary, capricious or invidious. He found they were not, because potential revenues could be jeopardized by requiring short term political advertisements, because users would be subjected to the blare of political propaganda, because "there could be lurking doubts about favoritism," and because "sticky administrative problems might arise in parcelling out limited space to eager politicians." Under those circumstances, Justice Blackmun wrote, "the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation." *Id.* at 304.

Summarizing his view, Justice Blackmun concluded:

> No First Amendment forum is here to be found. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity. In these circumstances, there is no First or Fourteenth Amendment violation.
>
> *Id.* at 304.

Justice Douglas cast the "swing" vote when he concurred in the affirmance because he did not believe "that petitioner has any constitutional right to spread his message before his captive audience." *Id* at 309.

Writing for the four dissenting members of the court, Justice Brennan argued that Lehman's message was unquestionably protected by the first amendment, that by accepting commercial and public service advertising the city had voluntarily established a forum for communication, and that once a public forum has been established, discrimination based "*solely* upon subject matter or content" is prohibited. *Id.* at 316 (emphasis in original). Justice Brennan rejected the distinction between commercial and political advertising because "subject matter or content censorship in any form is forbidden", *id.* at 317, and he found it impossible to draw with accuracy either "the line between ideological and non-ideological speech" or a "manageable line between controversial and non-controversial messages." *Id.* at 319-20. Nor did he accept the avoidance of "lurking doubts about favoritism" as a justification for excluding political ads when commercial ads were permitted.

Lehman was a close case, perhaps because content restrictions are not favored by the courts. Contrary to LILCO's argument, however, they need not always be justified by state interests that are "compelling". *Lehman* shows that if there is no public forum, then reasonable governmental restrictions on speech may be sustained provided they are not arbitrary, capricious, or invidious. *Cf.* Tribe, *supra* at 692-93. Such restrictions were upheld in *Connecticut State Federation of Teachers v. Board of Education Members*, 538 F2d 471 (CA2 1976), where the court concluded that school mailboxes, bulletin boards and meeting rooms are not public fora

required to be made available to a minority union. And in *Buckel v. Prentice*, 410 F Supp 1242 (SD Ohio 1976) a school's distribution to parents, via students, of information concerning coming theatrical events, home safety measures and the like, did not establish the "child messengers" as a public forum for first amendment purposes. The court there found that dissemination of such material was a logical and proper extension of the educational function of schools and that it did not "give rise to any right of access to student distribution by parents or other concerned citizens." 410 F Supp at 1247.

Comparing *Lehman*, itself, with the present case we find many parallels and a few significant differences. In virtually all respects, however, PSC's position is stronger than was that of the City of Shaker Heights.

a. In both cases, there were ample alternate forums available to the speaker.

b. The government's restriction was against "political or public issue advertising" in *Lehman*, and against "controversial issues of public policy" here. Both are content based restrictions aimed at closing the medium to political or controversial messages. However, Justice Brennan's difficulty in finding a manageable line between controversial and non-controversial messages in *Lehman* may be resolved here through the existing interpretations on cost allocation and the expeditious review procedure promised by PSC.

c. In *Lehman*, the advertising space was owned and regulated by the city, but was offered generally to the public for commercial use. LILCO's mailing envelopes are, of course, owned by LILCO, but regulated by PSC. Historically, LILCO's bill inserts have been messages generated either by LILCO or by PSC, and have not been available for use by the general public at all.

d. Neither the advertising cards on Shaker Heights' busses nor LILCO's bill inserts constitute one of "the traditional settings" where, as Justice Blackmun observed, "First Amendment values inalterably prevail." 418 US at 302. As with the car cards, LILCO's bill inserts involve "no open spaces, no meeting hall, park, street corner, or other public thoroughfare."

e. LILCO is engaged in the commercial activity of providing gas and electric service to the public. Its primary obligation is to provide efficient, economical utility service to Long Island residents under a monopoly franchise that is regulated in the public interest by PSC. Charges for its services are summarized in bills that are mailed in envelopes. From time to time, additional messages to the energy consumer have been included in the bill envelope. At times PSC has required certain messages to be brought to the consumer's attention by that means, and at other times, LILCO has sought to communicate with its consumers directly through the bill inserts. Clearly, what may be included in the billing envelopes is incidental to the basic service functions of both LILCO and PSC, just as providing car card space was incidental to Shaker Heights' function of providing public transportation.

f. In *Lehman*, a major point of difference between Justices Blackmun and Brennan was the former's view that the car cards were not a public forum, and the latter's conclusion that the city's own actions had turned the car cards into a public forum. PSC here, by this very regulation, is helping to prevent the bill inserts from becoming a public forum that would subject them to the strict scrutiny necessary for constitutional operation.

g. Shaker Heights' justifications for prohibiting political or public issue messages on its car cards were that the limitation on access to the advertising space would minimize (1) chances of abuse, (2) the appearance of favoritism, and (3) the risk of imposing upon a captive audience. All were accepted by Justice Blackmun as reasonable legislative objectives. Essentially similar justifications have been offered by PSC for keeping controversial issues of public policy out of utilities' bill inserts: (1) the risk of imposing on a captive audience, (2) the appearance of favoritism toward utilities' views on controversial issues, (3) the difficulties inherent in counteracting that appearance by permitting other points of view, and (4) the inevitable charges of improper conduct when PSC is placed in the position of an arbiter of fairness on controversial views, many of which may be far removed from matters of utility management and regulation.

In addition to the foregoing, however, PSC has two more justifications to add to its side of the balance. It seeks to protect the bill insert medium from over-use so that it may be preserved for important and useful information which PSC deems necessary for the consumer to use the utilities' services efficiently, economically and safely. In addition, PSC clearly seeks to avoid making a "public forum" out of the bill inserts, and thereby to steer clear of the issue that so sharply divided the Court in *Lehman*. As the Supreme Court found in *Police Department of Chicago v. Moseley*, 408 US 92, 96, 92 SCt 2286, 2290 (1972), "once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." Since substantial constitutional and administrative consequences would flow from a deter-

mination that a particular medium of communication qualified as a "public forum", surely PSC may limit use of the billing mechanism so that it does not become such a forum. In this way PSC could avoid being enmeshed in a wide variety of issues and considerations that are not directly related either to the regulatory responsibilities of PSC or to the business of the utilities it regulates.

In short, on this issue, the Supreme Court in *Lehman* upheld against a first amendment challenge a governmental prohibition against "political and public issue advertising" on rapid transit vehicles. *A fortiori*, PSC's ban of "controversial issues of public policy" from the bill inserts of New York's public utilities does not infringe the first amendment.

FOOTNOTES

[2] PSC disputes LILCO's contention that bill inserts are an effective means of communication compared to other methods, but LILCO has acceded to PSC's view for purposes of this motion, so there is no dispute as to this fact. It should be noted, however, that LILCO's position on the relative cost efficiency of bill inserts, compared with other forms of communication to the public, is supported by a PSC ruling that required utilities to use bill inserts to notify customers of prospective rate changes:

> While other methods of notification of rate filings are required by statute and the Commission's rules, the narrative description under discussion should be easier to read and understand and would be provided to all customers directly. *We believe that the bill insert requirement we have proposed should effect a significant improvement in notice to the public at minor cost.*
>
> Petition of Consumer Protection Board, NYS Public Service Commission, Case 26972, at 5-6 (Aug. 10, 1976) (emph. supp.).

Prior to this ruling, utilities were required to use newspaper advertisements to notify customers of proposed rate changes and hearings on such changes. Thus, despite its argument to the contrary in this case, PSC itself has recognized bill inserts as an efficient means of communication.

[3] Extending these contentions, LILCO urges that since the PSC ban "applies only to inserts which discuss 'controversial matters of public policy' and explicitly authorizes 'non-controversial' and 'useful' inserts, [LILCO] is unable to determine whether many inserts fall into the proscribed or encouraged category." Aff. of Ira L. Freilicher, ¶ 13. As an example, LILCO refers to a bill insert discussing the federal food stamp program which had been disseminated prior to the PSC ban. LILCO argues that the food stamp program has been the subject of some controversy, and that under the present PSC ban, it would be impossible to determine whether a food stamp insert would now be deemed "controversial" or "useful". See Freilicher aff., ¶¶ 14-15. As a result, LILCO claims that it would be reluctant to disseminate bill inserts on that topic in the future.

FOOTNOTES

[4] The account description provides:

> This account shall include expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation or ordinances (either with respect to the possible adoption of new referenda, legislation or ordinances or repeal or modification of existing referenda, legislation or ordinances) or approval, modification or revocation of franchises; or for the purpose of influencing the decisions of public officials or advancing the political objective of the utility, but shall not include such expenditures which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility's existing or proposed operations.
>
> Account 426.4, Expenditures for Certain Civic, Political and Related Activities. 16 NYCRR, Ch. III, Sub. Ch. F.

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IN THE

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Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

By this appeal, Consolidated Edison Company of New York, Inc. ("Con Edison" or "appellant") challenges the validity of an order of the Public Service Commission of the State of New York ("the Commission" or "appellee") prohibiting all utilities subject to the jurisdiction of the Commission from "utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the [utilities' positions] on controversial matters of public policy" (Appendix F, p. 58a).[1] Appellant's Jurisdictional Statement and appellee's Motion to Dismiss Appeal or Affirm Judgment Below ("Motion") bring into

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[1] The reference is to the appendix filed with appellant's jurisdictional statement.

sharp focus the numerous, substantial federal questions presented for this Court's consideration by this appeal.

The Nature of the Ban

The first issue involves the nature of the Commission's ban.[2] The Commission argues that its ban is not a content-based restriction and that it is consistent with several of this Court's decisions (Motion, p. 8). The decisions relied on by the Commission involved either regulation by the government of expression on its own property (*Lehman* v. *City of Shaker Heights,* 418 U.S. 298 (1974); *Greer* v. *Spock,* 424 U.S. 828 (1976)), or regulation of sexually-oriented materials (*Young* v. *American Mini Theatres, Inc.,* 427 U.S. 50 (1976); *Rowan* v. *United States Post Office Department,* 397 U.S. 728 (1970)). None of the cases involved a prohibition on the use of private property for the communication of one's views on matters at the core of the First Amendment. Allowing the Court of Appeals' judgment to stand would involve a significant expansion of the principles of the cases relied on by the Commission. Before such a result is permitted, its ramifications for free speech should be fully considered by this Court.

The Adequacy of the Asserted State Interests

In our jurisdictional statement (at pp. 19-27), we discussed the issues raised by the Court of Appeals' holding that protection of the privacy of the home from unwanted communications is a state interest sufficient to justify the prohibition on the mailing of messages at the core of the

[2] The nature of the ban determines the appropriate standard of review. A stringent standard of review is required for content-based restrictions, whereas a less exacting scrutiny has been applied to time, place, and manner regulations. Appendix A, pp. 8a-9a. In our view, none of the various justifications offered by the Commission meet either test.

First Amendment. In its Motion (at pp. 11-17), the Commission advances several other state interests which it claims justify its ban. Foremost among these is the claim that the ban is needed to assure that ratepayers are not forced to subsidize the dissemination of the views of utility management. The Commission argues that absent the ban, "the ratepayer will . . . be compelled to subsidize the billing process, a forced subsidy found impermissible in *Abood*",[3] (Motion, p. 16 n. 6). The issue is thus raised as to whether the use of bill inserts by utilities, at no cost to ratepayers, constitutes a subsidy of utility management by ratepayers.

In *Abood* the Court held that a complaint filed by governmental employees, who were compelled pursuant to state law to pay union dues in order to retain their jobs, stated a cause of action for violation of their First Amendment rights to the extent their dues were used by the union for political purposes unrelated to collective bargaining to which the complaining employees objected. This Court found that the facts alleged in the *Abood* complaint, if proved, would make out a case of subsidy because use of the employees' dues by the union for political purposes unrelated to collective bargaining resulted in the imposition of higher dues than the employees would otherwise have paid. In sharp contrast, in the case at bar, the use of bill inserts by utilities to express their views costs ratepayers nothing, as it is undisputed, and Special Term so held, that the cost of mailing bills to customers would be the same whether or not the inserts in question were included with the bills. Appendix C, pp. 26a-27a. No customer will pay one single penny more on account of the bill inserts than the rates established by the Commission as reasonable and necessary for the utility service provided. Application of the "forced subsidy" doctrine in these cir-

[3] *Abood* v. *Detroit Board of Education,* 431 U.S. 209 (1977).

cumstances would involve another significant restriction of the free expression of ideas. This issue also warrants full consideration by this Court.

The other issue raised by the Commission's "forced subsidy" argument is whether imposition of a total ban on the use of bill inserts, rather than elimination of the subsidy, is an appropriate remedy if a subsidy is found to exist in this case. The Commission argues that closing off the billing process for the disseminating of the utilities' views is the proper solution to the "forced subsidy" problem (Motion, p. 16). This view is in conflict with *Abood* in which the Court indicated that an injunction prohibiting the union from expressing its views on political matters would be violative of the First Amendment, *id.*, 431 U.S. at 238.

Other Issues

The papers before the Court also raise questions as to whether the Commission's bill insert ban leaves open ample alternative channels for communication of the utility's positions on controversial matters of public policy and whether the Commission's order is so vague as to deprive appellant of its liberty or property without due process of law. These issues are fully discussed in our jurisdictional statement (at pp. 27-31).

CONCLUSION

For the reasons stated in our jurisdictional statement and herein, probable jurisdiction should be noted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR APPELLANT

Opinions Below

The opinion of the Court of Appeals of the State of New York (J.S. App. 1a-15a)[1] is reported at 47 N.Y.2d 94, 390 N.E.2d 749, 417 N.Y.S.2d 30 (1979). The opinion of the New York Supreme Court, Appellate Division, Third Judicial Department (J.S. App. 16a-23a), is reported at 63 A.D.2d 364, 407 N.Y.S.2d 735 (1978). The opinion of the New York Supreme Court, Albany County (J.S. App. 24a-28a), is reported at 93 Misc. 2d 313, 402 N.Y.S.2d 551 (1978). The opinion of the Public Service Commission of

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[1] "J.S. App." refers to the Appendix filed with Appellant's Jurisdictional Statement. "A." refers to the Appendix filed with Appellant's Brief. "R." refers to the Record on Appeal in the court below.

the State of New York ("the Commission") (J.S. App. 31a-56a) is reported at 17 NY PSC 1-R (1977). The order of the Commission on rehearing (J.S. App. 59a-71a) is reported at 17 NY PSC 17-R (1977).[2]

Jurisdiction

The judgment of the Court of Appeals was entered on May 1, 1979 (J.S. App. 29a-30a). Con Edison filed a timely notice of appeal to this Court with the clerk of the Supreme Court, Albany County, on June 26, 1979 (J.S. App. 72a-74a). The jurisdictional statement was filed on July 27, 1979 and this Court noted probable jurisdiction on October 1, 1979. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2).

Statutes Involved

The First Amendment to the Constitution of the United States provides in relevant part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

[2] The Court of Appeals and the Appellate Division each dealt in a single opinion with the bill insert ban involved in this appeal and with another restriction imposed on utilities by the Commission, a ban on promotional advertising. Review of the ban on promotional advertising in the courts below was obtained by Central Hudson Gas & Electric Corporation, another utility subject to the jurisdiction of the Commission. Central Hudson's appeal from the Court of Appeals' judgment on the promotional advertising issue was docketed on October 5, 1979. *Central Hudson Gas & Electric Corp.* v. *Public Service Commission of the State of New York*, No. 79-565. Con Edison's challenge in this Court and in the courts below involves only the validity of the bill insert ban.

> No State shall * * * deprive any person of life, liberty, or property, without due process of law * * *.

The February 25, 1977 order of the Commission, the validity of which is involved in this appeal, is not reported and is set forth in the Appendix to the Jurisdictional Statement (57a-58a). In relevant part this order provides:

> All utilities subject to the jurisdiction of this Commission shall discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy.

The Court of Appeals determined that the Commission has statutory authority to regulate the content of billing envelopes (J.S. App. 6a-8a). The provisions of the New York Public Service Law (§2, subds. 10, 12; §4, subd. 1; §66, subds. 1, 12-a) which were held to give the Commission statutory authority to issue the above order appear at the end of this brief at 1s-3s.

Questions Presented

1. Whether the order of the Public Service Commission, insofar as it prohibits utilities from communicating their views to their customers on "controversial matters of public policy" by means of bill inserts, is invalid as a denial of freedom of speech.

2. Whether the words "controversial matters of public policy" as used in the Commission's order are so vague as to deprive appellant of its liberty or property without due process of law in violation of the Fourteenth Amendment.

Statement of the Case

The utility industry performs a vital role in meeting our Nation's energy requirements. It presently confronts several issues which have an important bearing on its ability to carry out this function. Examples of such issues, which are likely to have a significant impact upon utilities and consumers alike, are the use of coal for fuel for power plants to decrease dependency on expensive foreign oil imports, the replacement of investor-owned utility service by government-owned facilities, the use of nuclear power to provide the future needs for electric energy, the need for development of new sources of natural gas, the effect of environmental costs on utility rates, and other similar matters. As can be seen, all of these issues are the subjects of national public debate and it is essential to our democratic process that the free flow of information and ideas on these issues shall remain unfettered if the public is to be fully informed.

Appellant Con Edison provides electric, gas and steam service to more than three and a half million customers in the New York City area.[3] Bill inserts (messages included with bills mailed to customers) are the primary means by which Con Edison communicates its views to its customers on public issues which are important to them as consumers of utility services.[4] Evidence submitted by Con Edison in this case shows that it lacks ample alternative channels for the communication of this information, because other means of communication involve more cost, are less likely to reach Con Edison's customers, and may be less effective (A. 15-18).

[3] *Con Edison, Annual Report, 1978* at inside cover and 38.

[4] Con Edison also uses bill inserts to convey notices required by the Commission's regulations or by law to be sent to its customers, and to communicate information on such topics as new rates, energy conservation, customer service procedures, and safety in the use of the Company's services.

On February 25, 1977, the Commission announced a policy banning the use of bill inserts by utility companies for the purpose of communicating "their opinions or viewpoints on controversial issues of public policy" (J.S. App. 43a).[5] The Commission characterized utility customers as a captive audience and reasoned that "it is basically unfair to subject ratepayers who disagree with the utility's viewpoint to the arguments of the utility through its billing mechanism." *Id.* Bill inserts should be confined, the Commission concluded, to conveying "noncontroversial and useful information." *Id.* The Commission implemented its ban on the use of bill inserts by the order involved in this appeal.[6]

Con Edison, several other utilities and the New York State Consumer Protection Board petitioned for rehearing of the Commission's order (R. 62-115, 677-794). In its petition for rehearing Con Edison claimed that the Commission's order violated its freedom of expression secured to it by the First and Fourteenth Amendments to the

[5] The bill insert ban adopted by the Commission is virtually unprecedented in the history of utility regulation. Similar bans have been adopted only in California and Idaho. *Boushey* v. *Pacific Gas and Electric Co.*, 10 Pub. U. Rep. 4th 23 (Cal. Pub. Util. Comm'n 1975); *Kootenai Environmental Alliance* v. *Washington Water Power Co.*, No. U-1008-95 (Idaho Pub. Util. Comm'n Nov. 12, 1976). The order of the California P.U.C. was rescinded upon enactment of a statute incorporating its provisions. *Boushey* v. *Pacific Gas and Electric Co.*, Decision No. 85823 (May 11, 1976); *see Cal. Pub. Util. Code* §453(d) (West Supp. 1979). The order of the Idaho Public Utilities Commission was set aside as being outside the scope of its statutory authority. *Washington Water Power Co.* v. *Kootenai Environmental Alliance*, 99 Idaho 875, 591 P.2d 122 (1979).

[6] Anyone who knowingly fails or neglects to obey or comply with an order of the Commission may be punished by a fine not to exceed $1,000 for each violation. Every distinct violation of any order shall be a separate and distinct offense, and in case of a continuing violation each day shall be deemed a separate and distinct offense. N.Y. Pub. Serv. Law §§73, 86 (McKinney 1955).

United States Constitution and that the order was void for vagueness (R. 63-77). By order issued July 14, 1977, the Commission rejected these constitutional claims and denied the various petitions for rehearing (J.S. App. 64a-68a).

On November 7, 1977, Con Edison commenced an Article 78 proceeding and actions in Supreme Court, Albany County, to annul, vacate and set aside the Commission's order, to declare the order unconstitutional, and to permanently enjoin its enforcement (A. 2-18). Con Edison's Petition and Complaint included the allegation that by prohibiting Con Edison from using bill inserts to communicate its views on controversial matters to its customers, the Commission's order violated its freedom of expression under the First and Fourteenth Amendments to the United States Constitution (A. 6-7). Con Edison also alleged that the Commission's order was void for vagueness under the Fourteenth Amendment to the United States Constitution (A. 7).

Special Term of the Supreme Court held that the bill insert ban constituted a restriction on speech which was not justified by a compelling state interest. It rejected the Commission's argument that the use of bill inserts represents a subsidized means of presenting the utility's views, since it was conceded by the Commission that the cost of mailing would be the same whether or not the inserts were included with the bills, and the Commission may allocate any increased costs to the proper account (J.S. App. 26a-27a). Special Term also rejected the Commission's captive audience argument, finding that the mailbox is not a constitutionally protected enclave (J.S. App. 27a). Special Term also found that alternate channels of communication involve more cost, are less likely to reach subscribers and may be less effective. *Id.* Finally, Special Term concluded that the Commission's order was unconstitutionally vague (J.S. App. 27a-28a). Judgment in favor of Con Edison was entered on March 6, 1978 (A. 64-68).

Upon the Commission's appeal (A. 69), the Appellate Division, Third Department, reversed the judgment of Special Term and declared the Commission's order to be constitutional (A. 70-71). In its opinion, the majority of the Appellate Division noted that the cost of mailing out bill inserts stating the utility management's views on controversial matters of public policy should not be charged to utility customers, but should be borne by the utility's shareholders. It then concluded that it would be impossible for the Commission to separate out the costs attributable to mailing out bills (an expense chargeable to customers) from the costs attributable to mailing out management statements included in the billing envelopes (an expense chargeable to utility shareholders) (J.S. App. 18a). The majority also concluded that because the Commission's order did not ban Con Edison from using the "usual forms of advertisement," it constituted an "insignificant impingement" on Con Edison's constitutional rights, which it felt was far outweighed by the State's interest in preventing customer subsidy of "management's pamphleteering" (J.S. App. 19a). Finally, the majority held that the Commission's order was not unconstitutionally vague. *Id.* The minority of the Appellate Division found nothing to prohibit the Commission from "proportioning the costs so that the costs attributable to the placing of the bill inserts in envelopes and the mailing of bill inserts would be chargeable to shareholders rather than ratepayers" (J.S. App. 23a). Such an apportionment, the minority concluded, would prevent the subsidizing of management's views through the use of bill inserts. *Id.*

In affirming the order of the Appellate Division, the Court of Appeals recognized that government regulation designed to suppress traditional communicative activity because of its content or potential impact is subject to the most rigorous scrutiny (J.S. App. 8a). The Court of Appeals avoided this strict scrutiny by concluding that the Commission's ban is not a content-based regulation. Though recognizing that the Commission's ban "sweeps within its strictures only those bill inserts treating controversial topics," the court below concluded that such a limitation does not offend the First Amendment if it is applied, as the court below thought was the case here, "in an objective and evenhanded manner" (J.S. App. 11a). The Court of Appeals then concluded that the bill insert ban was a valid time, place and manner restriction, because it viewed the order as content neutral, as supported by a significant governmental interest, and as leaving open alternative channels of expression (J.S. App. 9a-11a). The governmental interest relied on by the Court of Appeals in upholding the Commission's ban is the perceived need to protect the privacy rights of utility customers. The court thought that receipt in the mail of a message stating the utility's view on a controversial matter of public policy might "offend the sensibilities" of some of the utility's customers (J.S. App. 10a). It then approved the Commission's ban on the ground that "[g]overnment need not stand idly by and deny assistance to those who are inflamed by having a particular opinion foisted upon them." *Id.* The Court of Appeals rejected the vagueness argument properly raised by Con Edison in its notice of appeal (A. 72-73) and in its brief (pp. 28-30) to that court without addressing the issue in its opinion. *See Street* v. *New York,* 394 U.S. 576, 581-85 (1969); R. Stern and E. Gressman, *Supreme Court Practice* §3.27, at 214-15 (5th ed. 1978).

Summary of Argument

The Court of Appeals erred in holding that the New York Public Service Commission's bill insert ban is not a content-based restriction on freedom of expression. On the basis of this erroneous holding, the Court of Appeals improperly treated the Commission's ban as a valid time, place and manner restriction, thereby relieving the Commission of its burden of justifying the ban by showing the existence of a compelling subordinating state interest as required by the decisions of this Court. If the decision of the court below is allowed to stand, it will open the way for large incursions on the protection consistently afforded by this Court to First Amendment rights.

The bill insert ban is content-based because it is specifically directed to communications which express the utilities' views on controversial matters of public policy. It is precisely on these issues that the need for unfettered discussion is the greatest and governmental interference in the free flow of information and ideas is most harmful.

The court below further erred in holding that the Commission's ban is valid because it serves the State's interest in protecting the privacy rights of utility customers in their homes. The court speculated that the bill inserts might inflame or offend the sensibilities of the recipients. This Court has held that the ability of government to shut off discourse to protect others from hearing it is "dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." There is no such showing here. The recipient of a bill insert is free to read it or to discard it unread. This fleeting exposure, wholly within the control of the recipient, is much less intrusive on the privacy of the home

than door-to-door canvassing which this Court has upheld. The applicable principle established by this Court is that the decision as to whether a communication is to be received at home shall be made by the intended recipient and not one for the State to impose upon the entire community. The court below relied on no other governmental interest in support of the Commission's order.

The Court of Appeals also erred in holding that the ban on bill inserts is valid because it extends only to one manner of communication. We read the decisions of this Court as extending the protection of the First Amendment to any restriction on expressive activity based on its content, subject to a showing by the state of a compelling subordinating state interest. It is in cases involving proper time, place and manner restrictions on content-neutral speech that the Court has insisted that inquiry must be made as to the availability of ample alternative channels for communication. Even if this case can properly be viewed as a time, place and manner case, which we believe cannot be done under the decisions of this Court, the ban on bill inserts does not leave open to Appellant ample alternative channels for the communication to its customers of its views on controversial public issues. The uncontradicted evidence in the record establishes that bill inserts are the most effective and least costly means for such communication and involve more autonomy than any alternative.

The Court of Appeals erred in rejecting Appellant's claim that the bill insert ban is unconstitutionally vague. There are no standards to inform the utilities or to guide the Commission in the application of the prohibition, and the Commission's offer to provide advisory rulings, although a recognition of the vagueness, is intolerable censorship.

ARGUMENT

Introduction

By this appeal Con Edison seeks the reversal, on First and Fourteenth Amendment grounds, of the judgment of the New York Court of Appeals upholding an order of the State Public Service Commission prohibiting utilities from using bill inserts to communicate their views on controversial matters of public policy to their customers (J.S. App. 58a). The decision of the court below is not in accord with applicable decisions of this Court. On the basis of its erroneous conclusion that this content-oriented ban constitutes a valid time, place and manner restriction, the court below failed to apply the more rigorous standards, firmly established by this Court, requiring that a content-based restriction on freedom of expression imposed by a state must survive exacting scrutiny, that encroachment cannot be justified upon a mere showing of some legitimate state interest but the interest advanced must be of vital and compelling importance, and that the burden is on the state to show the existence of such an interest. We submit that the application of these standards requires a reversal of the judgment below. An affirmance would greatly diminish the protection consistently afforded by this Court to freedom of expression under the First Amendment.

I

The Court of Appeals Erred in Holding That the Commission's Ban Is Not a Content-Based Regulation.

The fundamental and crucial error underlying the judgment below is the conclusion of the Court of Appeals that the Commission's bill insert ban is not a content-based restriction. It is on the basis of this erroneous conclusion that the Court of Appeals relieved the Commission of its burden of showing the existence of a compelling subordinating interest as required by *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 786 (1978), and the long line of this Court's decisions cited therein.

The bill insert ban is specifically directed to communications which express the utilities' views on controversial matters of public policy. This Court in *Bellotti* reaffirmed the principle that discussion of public issues "is at the heart of the First Amendment's protection." 435 U.S. at 776. As the Court stated:

> The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

Id. at 776, quoting *Thornhill* v. *Alabama,* 310 U.S. 88, 101-02 (1940).

Bellotti also made it clear that speech does not lose the First Amendment's protection because its source is a corporation. 435 U.S. at 777. Utilities, no less than other corporations, are entitled to the First Amendment's protection. In *Bellotti* the Court cited with approval several decisions in which restrictions on speech by utilities were invalidated. 435 U.S. at 790 n.29.

None of these established principles is inapplicable here because of the means (bill inserts) chosen by Con Edison to communicate its ideas. This Court has expressly held that "[t]he liberty of the press is not confined to newspapers and periodicals. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell* v. *Griffin,* 303 U.S. 444, 452 (1938). And freedom of speech and the press extend not only to the content of communications, but embrace the right of distribution: "[l]iberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Ex parte Jackson,* 96 U.S. 727, 733 (1878). *See also Lovell* v. *Griffin,* 303 U.S. at 452.

These guiding principles of First Amendment protection would mean little if they are permitted to be avoided by the erroneous conclusion that a ban on the expression of views on controversial public issues is not a content-based restriction. The Court of Appeals' error is clearly demonstrated by comparing two of this Court's decisions. *Police Department of Chicago* v. *Mosley,* 408 U.S. 92 (1972), is illustrative of content-based regulations. That case involved the validity of a Chicago ordinance prohibiting picketing within 150 feet of a school during school hours, but excepting "peaceful picketing of any school involved in a labor dispute." In writing for the Court, Mr. Justice Marshall stated:

> The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its sub-

> ject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign.
>
> . . . .
>
> In this case, the ordinance itself describes impermissible picketing not in terms of time, place, and manner, but in terms of subject matter. The regulation "thus slip[s] from the neutrality of time, place, and circumstance into a concern about content."

Id. at 95-99 (footnote omitted). Because the government discriminated among pickets in terms of their messages, the ordinance was held to be unconstitutional.

Kovacs v. *Cooper,* 336 U.S. 77 (1949), is illustrative of time, place and manner regulations. In that case, this Court upheld municipal regulation of sound trucks on the ground that the ordinance did not restrict "communication of ideas or discussion of issues by the human voice, by newspapers, by pamphlets, by dodgers." *Id.* at 89. It applied generally to loud and raucous noises without regard to content.

The ban approved by the court below is a classic example of a content-based restriction. The ban is determined solely by reference to the content of the message. Utility companies are barred from sending controversial messages, even though they involve issues closely related to their business, whereas "noncontroversial and useful" messages are permitted (J.S. App. 43a). As in *Police Department of Chicago* v. *Mosley,* 408 U.S. at 95, "[t]he operative distinction is the message." Moreover, the court below could not justify the bill insert ban by reference to "an important or substantial governmental interest [that] is unrelated to the suppression of free expression," *United*

States v. *O'Brien,* 391 U.S. 367, 377 (1968). As we will discuss later in this brief, the harm perceived by the court below as the justification for upholding the ban is based upon the communicative content of the bill inserts. The decisions of this Court clearly require that the bill insert ban must be categorized as a content-based restriction.

The court below reached a contrary result by concluding that the bill insert ban "does not discriminate against persons of any particular political stripe or prohibit the expression of any one position on a hotly debated issue" (J.S. App. 11a), and that it is applied "in an objective and evenhanded manner." *Id.* What the court is suggesting is that so long as the speech of all parties to a debate is equally suppressed, there is no violation of the First Amendment. Under this approach, the State may suppress debate on any or all public issues, so long as the prohibition is applied in an "evenhanded manner."

The court below relied on *Greer* v. *Spock,* 424 U.S. 828 (1976), and *Lehman* v. *City of Shaker Heights,* 418 U.S. 298 (1974), to reach the conclusion that the Commission's ban is not content-oriented (J.S. App. 11a). We submit that these cases are inapposite here.

First, in *Greer* and *Lehman,* speakers were seeking to obtain forced access to use the government's property for their purposes. The Court rejected these claims because it recognized that the government, as owner of property, maintains a right to control the use of its property. Thus, in *Greer,* the Court held that candidates for political office have no constitutional right to make political speeches on a government military base:

> The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.

424 U.S. at 836, quoting *Adderley* v. *Florida*, 385 U.S. 39, 47 (1966). Similarly, in *Lehman*, the Court held that a municipal transit system may refuse to rent advertising space on its vehicles to candidates for political office:

> In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles.

418 U.S. at 303.

In sharp contrast, what the State has done in this case is to prevent a corporation from using its own property for the exercise of protected expression.

Second, in *Greer* and *Lehman*, the Court emphasized that the restrictions were applied in an evenhanded manner. In *Greer*, not only Dr. Spock but all others were denied permission to make political speeches at Fort Dix. 424 U.S. at 831, 838-39. In *Lehman*, not only Harry Lehman but all other political candidates were refused advertising space on the city's transit vehicles. 418 U.S. at 300-01.

Contrary to the Court of Appeals' conclusion, the Commission's ban *does* prohibit the expression of one position on hotly debated issues. By its terms the Commission's order prohibits the use of bill inserts "as a mechanism for the dissemination of the *utility's position* on controversial matters of public policy" (J.S. App. 58a; *see also* J.S. App. 43a) (emphasis added). Nor is the restriction applied by the State in an evenhanded manner. The ban applies only to utilities and to no one else (J.S. App. 58a).

The Court of Appeals erred in concluding that the Commission's ban is not a content-based regulation. Its judg-

ment is totally incompatible with the pronouncements of this Court:

> In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.

First National Bank of Boston v. *Bellotti*, 435 U.S. at 784-85, citing *Police Department of Chicago* v. *Mosley*, 408 at 96.

II

The Commission's Ban Has Not Been Justified by a Sufficient Governmental Interest.

The Court of Appeals identified vindication of "the privacy rights of utility customers" as the governmental interest served by the Commission's ban (J.S. App. 9a, 10a). We submit that this does not constitute a sufficient justification to sustain the ban either as a time, place and manner restriction or as a content-based restriction. Because the Commission's ban falls in the latter category, it may be upheld only if the Commission has met its burden of showing that the regulation is needed to further a compelling governmental interest.

A. *The State's Interest in Protecting the Privacy of the Home From Unwanted Communications Is Not Sufficient to Justify the Prohibition on the Mailing of Messages at the Core of the First Amendment.*

The Court of Appeals speculated that a bill insert stating a utility's viewpoint on a controversial topic "is as likely to offend the sensibilities of the recipient as it is to elicit

agreement" (J.S. App. 10a). It then concluded that "[g]overnment need not stand idly by and deny assistance to those who are inflamed by having a particular opinion foisted upon them." *Id.* Plainly, the purported governmental interest relied upon by the court is directly related to the content of the nessage and, therefore, to the suppression of free expression. *See* pp. 13-14, *supra.*

It is clear that in the circumstances of this case, protection of the customers' privacy interests is not a compelling governmental interest. The insignificant infringement of customers' privacy resulting from exposure to bill inserts is not the kind of interest that can justify the significant restriction of Con Edison's freedom of expression.

In *Cohen* v. *California,* 403 U.S. 15, 21 (1971), this Court established the standard to be applied in cases of conflict between the rights of privacy and free expression:

> The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

See also Erzoznik v. *City of Jacksonville,* 422 U.S. 205, 208-12 (1975). *Cohen* and *Erzoznik* involved alleged invasions of privacy outside the home. Even if we assume that a standard more protective of the right of privacy should be applied in cases involving the home, Con Edison's First Amendment rights should prevail over the customers' privacy rights because the invasion of the privacy of the home on the facts of this case is so insignificant.

A customer who receives a bill insert message on a public issue is not forced to read that message and may discard it as quickly as he or she wishes. This fleeting exposure, wholly within the control of the recipient, can hardly be said to constitute an invasion of "substantial privacy interests . . . in an essentially intolerable manner." The trivial burden of disposing of unwanted mail is insufficient to justify the far-reaching infringement of First Amendment rights approved by the court below.

Moreover, bill inserts are the least intrusive means of communication. They are much less intrusive than doorbell ringing and door-to-door canvassing, which this Court approved in *Martin* v. *Struthers,* 319 U.S. 141 (1943), or communication by telephone.

Finally, the Commission's ban is overbroad. It is a drastic remedy to shut off a means of communication to Con Edison's more than three and a half million customers in order to protect a few customers from momentary exposure to ideas they might not agree with.

In holding that protection of the customers' right of privacy justifies infringement of Con Edison's freedom of expression, the Court of Appeals relied on several of this Court's decisions (J.S. App. 10a). The Court of Appeals misconstrued all of these decisions, for none of them supports its conclusion. *Rowan* v. *United States Post Office Department,* 397 U.S. 728 (1970), and *Martin* v. *Struthers, supra,* make clear that the decision as to whether a given communication is to be received at home is a judgment for each person to make, not one for the State to impose, as the Commission did here, upon the entire community. In addition, *Rowan* did not involve, as does this case, speech which is at the core of the First Amendment. In *Kovacs* v. *Cooper, supra,* unlike this case, there was no attempt to regulate the content of the communications. *Cohen* v.

California, supra, involved a conflict between the First Amendment rights of speakers and the privacy rights of unwilling viewers outside the home. In holding that the First Amendment rights of speakers prevailed in that context, the Court, as noted above, established a standard the state must meet in order for the right of privacy to prevail, and the State has not complied with that standard here.

The Court of Appeals also relied on *Public Utilities Commission* v. *Pollak,* 343 U.S. 451, 467-69 (1952) (Douglas, J., dissenting), in which reference was made to a "captive audience." There is no captive audience in this case. There is no coercion to read unwanted mail as the recipient is free to discard the utility's message, unread, the minute he or she receives it.

B. *The Use of Bill Inserts by Utilities Does Not Compel Customers to Subsidize the Expression of Viewpoints With Which They Disagree.*

The Commission's Counsel argued in the courts below that the bill insert ban is needed to protect customers from being forced to subsidize the expression of viewpoints with which they disagree. This argument was not relied upon, or even mentioned, by the Court of Appeals, but it was accepted as the justification for the upholding of the ban by the New York State Supreme Court, Appellate Division (J.S. App. 18a-19a).

The Commission was not concerned about this so-called subsidy when it promulgated its ban, and made no reference to it in its opinion (J.S. App. 43a). The subsidy issue merited no more than a footnote in the Commission's subsequent order on rehearing (J.S. App. 67a). More importantly, the Commission's order by its terms imposes a total, unconditional ban on the use by utilities

of bill inserts (J.S. App. 58a). The ban would apply even if the entire cost of the mailing were borne by the utilities' shareholders. That this is the intended effect of the order is shown by the Commission's accompanying Statement of Policy which expresses disapproval of the use of bill inserts to communicate a utility's viewpoint on controversial issues *"even when the stockholder pays for it in full"* (J.S. App. 43a) (emphasis added). Thus, whether or not customers would bear any of the costs is made wholly immaterial by the Commission's order.

In any event, it is undisputed that the sending out of the bill inserts will not cost the ratepayers one cent more than the rates they already pay (J.S. App. 26a-27a). Those rates, as fixed by the Commission from time to time after extensive public hearings, are established to give the ratepayers full value in utility services for the charges imposed. Whether the ratepayers agree or disagree with the messages, they pay nothing for exercising either privilege. The fact that the utilities may incidentally save money by the use of bill inserts, at no expense to the ratepayers, is not detrimental to the ratepayers or the public.

Protection of customers from this so-called subsidy, which costs customers nothing, is not the kind of vital, compelling justification for deprivation of First Amendment rights that has ever been countenanced by this Court and should not be countenanced in this case.

III

The Commission's Ban Cannot Be Sustained on the Ground That It Extends Only to One Manner of Communication.

The Court of Appeals viewed the prohibition on bill inserts with approval because it extends "only to one manner of communication." (J.S. App. 9a). We submit that this view does not comport with the decisions of this Court in a case such as this where the prohibition is based solely on the content of the communication. In *Police Department of Chicago* v. *Mosley*, 408 U.S. at 96, quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964), the Court stated:

> *Any restriction* on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." (Emphasis supplied).

Similarly, in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), a case involving a content-based regulation, the Court noted:

> We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means. . . ."

Id. at 757 n.15.

Thus, the Commission's ban on bill inserts cannot be sustained on the ground that it only extends to one means of communication.

The Court of Appeals, however, adverted to this subject again in connection with its holding that the Commis-

sion's ban constitutes a valid time, place and manner restriction (J.S. App. 9a-11a). Under *Virginia Pharmacy Bd., supra,* 425 U.S. at 771, this Court enumerated the essential elements of such a restriction, *i.e.,* it must be justified without reference to the content of the regulated speech, it must serve a significant governmental interest, and it must leave open ample alternative channels for communication of the information. The conjunctive statement of these elements makes it clear that the absence of any one is sufficient to deny validity to a purported time, place and manner restriction on freedom of speech.

For the reasons stated in points I and II above, we submit that the Commission's ban does not fulfill the first two requirements in that it is content-based and is not justified by a significant governmental interest. We further submit that the court below erred in concluding that the ban leaves open "numerous alternative means of communication" (J.S. App. 9a).

In *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85, 93 (1977), the Court's careful consideration of the availability of ample alternative channels of communication and its finding that the alternatives there involved were "far from satisfactory" clearly demonstrate that this vital element of a time, place and manner restriction must be thoroughly scrutinized. The Court pointed out the relevant factors for analysis in the determination of the adequacy of the alternatives—do they involve more cost and less autonomy, are they less likely to reach persons not deliberately seeking the information, and may they be less effective media for communicating the message.

The court below paid no heed to the *Linmark* guidelines nor to this Court's admonition that if a proscription is

based on content the fact that it applies only to one mode of communication does not transform the case into a time, place, or manner case. *Id.* at 94. In the short paragraph devoted to this issue in its opinion, the court below disposed of the matter by saying that the Commission's ban on bill inserts did not take from the utilities whatever other modes of speech they previously had; that the costs of utilizing these other modes may be higher is not determinative; and that Con Edison wholly failed to demonstrate that it will be effectively precluded from exercising its rights (J.S. App. 9a-10).

The court's first point is merely a restatement of its erroneous view that a restriction on speech is valid if it only extends to one mode of communication. No evaluation was made of the comparable effectiveness of the remaining alternatives. As to its second point, while higher cost alone may not be determinative, certainly consideration should have been given to the record evidence to determine whether the higher costs of the alternatives were of such magnitude as to amount to a prohibition. Finally, we believe the court is in error in casting the burden of proof on Con Edison. Consistent with this Court's repeated insistence that the burden is on the government to justify its restriction on speech by showing a sufficient state interest, we believe the state should have the duty to ascertain, prior to instituting time, place and manner restrictions, that those whose freedom of speech is being infringed have ample alternative channels for the expression of their views.

In the proceedings below Con Edison was the only party to submit evidence on the adequacy of alternative means of communication (A. 15-18). That evidence was specifically addressed to the adequacy of the only alternatives available to Con Edison in light of the *Linmark* guidelines. Those

alternatives are a separate mailing, television time, radio time and newspaper space.

The evidence, not controverted in any respect by the Commission or any other party, compels the conclusion that none of the alternatives is adequate to replace bill inserts. A separate mailing would involve higher costs in postage alone of $210,000 (at 1977 rates) and would be prohibitively expensive. Television is not an effective medium for communicating lengthy messages on complicated subjects. Ordinarily a 60-second spot is the longest Con Edison could obtain and this would not be adequate. Also, costs for just one minute of television time in the New York City area would range from $3,000 to $10,000 depending on the station and the time. Radio advertising is also ineffective for communicating lengthy messages and would not reach a large part of our customers. Newspaper advertising would involve higher costs in excess of $100,000 per message and would be less effective than bill inserts in terms of readership. Bill inserts also provide a greater degree of autonomy than commercial media; they involve no intermediate agent for communication of the message other than the postal service.

The court below erred in reaching the conclusion, despite this evidence, that Con Edison "wholly failed to demonstrate that it will be effectively precluded from exercising its rights" (J.S. App. 10a).

IV

The Court of Appeals Erred in Rejecting Con Edison's Claim That the Commission's Bill Insert Ban Is Unconstitutionally Vague.

It is a basic principle of due process under the Fourteenth Amendment to the United States Constitution that an enactment is void for vagueness if its prohibitions are not clearly defined. *Grayned* v. *City of Rockford,* 408 U.S. 104, 108 (1972). *See also First National Bank of Boston* v. *Bellotti,* 435 U.S. at 785 n. 21; *Hynes* v. *Mayor of Oradell,* 425 U.S. 610 (1976); *Buckley* v. *Valeo,* 424 U.S. 1, 40-41 (1976); *Coates* v. *City of Cincinnati,* 402 U.S. 611 (1971). Moreover, "stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." *Smith* v. *California,* 361 U.S. 147, 151 (1959).

The vice of vagueness in the First Amendment area is threefold: (1) it may trap the innocent by failing to provide fair warning; (2) it does not provide explicit standards for those who apply them, thus fostering arbitrary and discriminatory enforcement; and (3) it operates to inhibit the exercise of First Amendment freedoms. *Grayned* v. *City of Rockford,* 408 U.S. at 108-09.

The Commission's ban on the use of bill inserts which express the utilities' positions on "controversial matters of public policy" suffers from all of these vices.

In response to this challenge to the Commission's order in Con Edison's petition for rehearing before the Commission, the answer given by the Commission was that "[i]n the event a utility wishes additional guidance with respect to this matter, it should feel free to seek it. We will resolve

any request expeditiously so that no undue delay will result" (J.S. App. 68a). We submit that this is blatant censorship which cannot be substituted for a clearly defined statement of a prohibition in an attempt to subvert the vagueness doctrine. As this Court stated in *Kunz* v. *New York,* 340 U.S. 290, 295 (1951):

> It is sufficient to say that New York cannot vest restraining control over the right to speak on religious subjects in an administrative official where there are no appropriate standards to guide his action.

See also Cantwell v. *Connecticut,* 310 U.S. 296 (1940); *Lovell* v. *Griffin, supra.*

There are no standards to guide the Commission's actions. Its future pronouncements, if any, as to which matters are controversial and which are not, will amount to nothing more than arbitrary and subjective applications of a vague standard.

Although this issue was argued in our brief to the Court of Appeals, its opinion does not consider it. We submit that the court erred in its failure to invalidate the Commission's ban on the ground that it is unconstitutionally void for vagueness.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and the case remanded with directions that the judgment of the Supreme Court, Albany County, be reinstated.

Respectfully submitted,

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November 1979

Other Statutory Provisions Involved

The New York Public Service Law (McKinney 1955 and Supp. 1978-1979) provides in relevant part:

§ 2. Definitions

* * *

10. The term "gas plant," when used in this chapter, includes all real estate, fixtures and personal property operated, owned, used or to be used for or in connection with or to facilitate the manufacture, conveying, transportation, distribution, sale or furnishing of gas (natural or manufactured or mixture of both) for light, heat or power, but does not include property used solely for or in connection with the business of selling, distributing or furnishing of gas in enclosed containers.

* * *

12. The term "electric plant," when used in this chapter, includes all real estate, fixtures and personal property operated, owned, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power; and any conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat or power.

* * *

§ 4. The public service commission

1. There shall be in the department of public service a public service commission, which shall possess the powers and duties hereinafter specified, and also all powers necessary or proper to enable it to carry

out the purposes of this chapter. The commission shall consist of five members, to be appointed by the governor, by and with the advice and consent of the senate. A commissioner shall be designated as chairman of the commission by the governor to serve in such capacity at the pleasure of the governor or until his term as commissioner expires whichever first occurs. No more than three commissioners may be members of the same political party unless, pursuant to action taken under subdivision two, the number of commissioners shall exceed five, and in such event no more than four commissioners may be members of the same political party.

• • •

§ 66. General powers of commission in respect to gas and electricity

The commission shall:

1. Have general supervision of all gas corporations and electric corporations having authority under any general or special law or under any charter or franchise to lay down, erect or maintain wires, pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places of any municipality for the purpose of furnishing or distributing gas or of furnishing or transmitting electricity for light, heat or power, or maintaining underground conduits or ducts for electrical conductors, and all gas plants and electric plants owned, leased or operated by any gas corporation or electric corporation.

• • •

12-a. Have power to fix and alter the format and informational requirements of bills utilized by public

and private gas corporations, electric corporations and gas and electric corporations in levying charges for service, to assure simplicity and clarity and to require indication of any adjustment charges, including but not limited to fuel adjustments, in monetary amounts. The commission shall further ensure periodic explanation of applicable rates and rate schedules for the purpose of assisting customers in making the most efficient use of energy.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

Statement of the Case

This case involves an appeal from a judgment (J.S. App. 29a-30a)[1] of the Court of Appeals of the State of New York

[1] References to "J.S. App. ...." are to Consolidated Edison's appendix to its Jurisdictional Statement; to "App. ...." are to Consolidated Edison's appendix to its brief on the merits; to "R. ...." are to the Record on Appeal below; and to "Commission's App. ...." to the Public Service Commission's appendix to its Motion To Dismiss Appeal Or Affirm Judgment Below.

which upheld an order by appellee Public Service Commission of the State of New York (Commission) restricting the use of utility bill inserts (leaflets enclosed with utility bills). The order prohibits utilities, including appellant Consolidated Edison Company of New York, Inc. (Consolidated Edison), from using bill inserts to disseminate messages espousing the position of utility managements on controversial matters of public policy.

The Commission's bill insert order was the culmination of its investigation of a complaint filed against Consolidated Edison by the Natural Resources Defense Council, *et al.* (NRDC) (App. 23-48). The NRDC objected to a Consolidated Edison bill insert discussing the need for nuclear power development. The complaint asked the Commission to ban the use of bill inserts for purposes of political advertising and, in addition, provide remedial relief to the complainants that would allow them to enclose a supplement in a future monthly billing presenting their views on nuclear power. The Commission concluded that the billing mechanism was an improper forum for use by utility management to express its views on controversial issues. It stated (J.S. App. 43a):

> Further, we shall not permit advertising on matters of public controversy to be included in the printed material that often accompanies the mailing of consumer bills. We believe that using bill inserts to proclaim a utility's viewpoint on controversial issues (even when the stockholder pays for it in full) is tantamount to taking advantage of a captive audience, since the consumer cannot avoid receiving the literature with the utility's message. Regardless of whether consumers read the material, it is basically unfair to subject ratepayers who disagree with the utility's viewpoint to the arguments of the utility through its billing mechanism. A utility company's mailing list provides an available conduit for the easy dissemination of information, which should be used for the benefit of both the consumer and the company to convey noncontroversial and useful information that will create a better informed public. It should not become a vehicle for dissemination only of the company's views on controversial matters of public policy. Accordingly, we will not permit bill inserts to be used by utility companies for the purpose of advertising their opinions or viewpoints on controversial issues of public policy.

When denying rehearing, the Commission discussed its rationale in greater detail (J.S. App. 64a-68a). It noted that the billing mechanism provided a unique means by which management may get its views in the hands of the ratepayers and that this conferred an undue advantage on management. Further, it noted the spacial limitations of the bill insert. The limitations, the Commission concluded, argued for restricting the use of bills inserts (J.S. App. 66a) ". . . to convey information that is clearly helpful to consumers, such as practical steps that individuals can take to conserve energy . . ." Finally, the Commission addressed the Constitutional free speech aspect of its ruling, stating (J.S. App. 67a):

> . . .[I]t does not contravene the utilities' rights of free speech or press. Utility bill inserts are not newspapers which, in principle, any person is free to publish and thereby make his opinions known to the public. The privilege to disseminate utility bill inserts derives from the privilege of franchised monopoly, conferred by the government. It can, therefore, be regulated by the government to assure that it is exercised in the public interest.
>
> We have not, of course, prohibited the utilities from expressing their corporate opinions on controversial public policy issues in any other media. They are free, like all other members of our society, to explain their positions on radio and television interviews, to seek to

purchase space in newspapers, and to speak before public gatherings. For these kinds of communications, we merely require that the companies, rather than their customers, bear the costs.

The goal of free speech and of a free press is a well-informed electorate capable of making sound public policy decisions. Our ruling does not diminish to any substantial degree the utilities' ability to contribute to that goal. It does, however, preclude their monopolizing the unique utility bill insert medium.[1]

[1] We note also that where the ratepayer's bill is accompanied by political advertisement, the political material is, absent allocation, getting a free ride; the utility is deriving the economic benefit of postage, envelope, labor and overhead involved in the billing process. And even if an allocation of the expenses could be made, the actual cost of enclosing such material in the bill itself does not approach the one-sided benefit to the management of being able to use the unique billing process in presenting its side of the controversy. It is certainly questionable whether ratepayers should be compelled to support views with which they do not agree. See *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

As a final matter, the Commission considered (J.S. App. 68a) the question of whether its standard of "controversial matters of public policy" was too vague. It decided that it was not, but did agree to provide prompt advisory rulings, if requested, on whether specific subjects came within its ban.

Consolidated Edison thereafter commenced a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules to review the Commission's determination. The litigation concluded in a judgment by the New York Court of Appeals upholding the Commission (J.S. App. 29a-30a). In its decision (J.S. App. 1a-15a), the Court of Appeals found first that the Commission had adequate statutory authority for its order and then held that the order was not barred by the First Amendment.

Prior to Consolidated Edison's state court proceeding, Long Island Lighting Company had commenced a suit to challenge the Commission's order in the Eastern District of New York. That case, *Long Island Lighting Company v. Public Service Commission* (77 Civ. 972), has been decided in an unreported decision by District Judge George C. Pratt (Commission's App. 20-42). By judgment dated March 30, 1979, Judge Pratt granted the Commission a declaratory judgment that its bill insert order ". . . does not infringe plaintiff LONG ISLAND LIGHTING COMPANY's rights under the first and fourteenth amendments to the United States Constitution." The case is now on appeal to the United States Court of Appeals for the Second Circuit.[2]

[2] In addition to Consolidated Edison's brief, we are also in receipt of briefs from numerous *amici* urging that this Court reverse the determination of the New York Court of Appeals. We have carefully examined the briefs of the *amici*, and except where noted specifically hereafter, believe that we have dealt with the points made in those briefs in the context of our response to Consolidated Edison's submission. Several references will be made to the brief of Long Island Lighting Company (LILCO) because of its detailed comments on various aspects of this case.

Summary of Argument

The New York Court of Appeals properly concluded that the Commission's ban on the use of utility bill inserts to express management's views on controversial matters was not prohibited by the First Amendment. The Court found that the Commission's prohibition was merely an evenhanded attempt to assure that the subject matter of political debates does not intrude upon the billing process. There has been no attempt to foster or stifle a particular point of view. The court correctly found that the ban is akin to a "time, place and manner" restriction on speech frequently allowed by this Court.

While restricting bill inserts, the Commission's ban leaves open ample alternative channels for communication of management's views. Consolidated Edison has every available means (the press, radio, television, news conferences, etc.) except bill inserts. It can even make direct mailings to its consumers.

The Commission's ban fulfills important state interests including (i) assuring that the limited space in bill inserts is used for utility service related purposes (*e.g.*, messages relating to complaint procedures, energy conservation, and safety hints); (ii) preventing ratepayers from becoming a captive audience for utility management's views; (iii) assuring that the ratepayers are not required to subsidize or provide a free ride for the dissemination of views with which they may disagree; and (iv) prevention of the emergence of a public forum where all points of view on controversial issues must be expressed while at the same time lessening the usefulness of the bill insert as a means of providing utility service-related information. As our discussion will show, because of the unique character of utility company bill inserts these various state interests, while discussed separately, are closely interrelated and should be considered on an aggregate basis.

The Commission's standard "controversial matters of public policy" is not unconstitutionally vague. It provides adequate notice to utilities as to what subjects are to be excluded from bill inserts.

ARGUMENT

Introduction

Throughout the course of this litigation, Consolidated Edison has consistently failed to grapple with the factual circumstances of this case, circumstances which fully justify the Commission's restriction on the use of utility bill inserts. The Commission and the court below have properly recognized that a public utility subject to pervasive state regulation may have its billing process controlled so that it operates in the public interest. In this case neither the need for nor the propriety of the regulation is diminished merely because it has an incidental impact on Consolidated Edison's ability to communicate. The Commission's order does not prevent debate on public issues from being "uninhibited, robust, and wideopen" (*New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)); rather it assures that the utility billing process is used only for matters directly relating to the rendition of utility service, a state interest entitled to full recognition by this Court.

Consolidated Edison has been joined by numerous *amici* in urging this Court to invalidate the Commission's bill insert regulation. A common theme running through Consolidated Edison's brief, as well as those of the *amici*, is that the Commission's regulation somehow significantly restricts the freedom of utilities to engage in public debate about controversial issues. This is simply not the case, since the order restricts but one form of communication leaving open all other forms of

communication a utility may desire to use. There is no support whatsoever for the proposition that utilities are unable to engage in public debate about any issue if the debate is not carried on in the midst of the utility billing mechanism.

I. The Courts Below Correctly Determined That Bill Inserts May Be Regulated Without Abridging Consolidated Edison's Freedom Of Speech.

A. The Commission's Regulation Is A Subject-Matter Restriction Frequently Permitted By This Court.

Consolidated Edison argues (Br. pp. 12-17) that the Commission's bill insert regulation is content related, therefore requiring (Br. pp. 17-21) that it withstand exacting scrutiny and be supported by a compelling state interest. While the Commission's regulation is not content related as that term has frequently been applied by this Court, the Commission's ban is nevertheless supported by several compelling state interests. These interests, as we discuss, *infra,* provide a complete justification for the ban, particularly in light of the regulation's minor restriction on Consolidated Edison's ability to communicate with its customers.

Consolidated Edison argues at length that the New York Court of Appeals erred when it concluded that the Commission's regulation is not a content-based restriction. Its argument misconstrues the finding of the court because it fails to consider the reasoning for its conclusion. The court properly considered the Commission's order to be closely akin to a traditional time, place and manner restriction frequently permitted by this Court. *See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748, 771 (1976), where the Court noted that: ". . . [w]e have often approved restrictions of that kind [time, place and manner] provided that they are justified without reference to the content of the regulated speech, that they

serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information. . . ." [Citations omitted].[3]

The New York Court of Appeals concluded that the Commission's ban met the tests required for a time, place and manner restriction. It found (J.S. 9a-11a) that (1) ". . .[t]here is no doubt but that the regulation leaves open numerous alternative means of communication. . .."; (2) ". . . the ban unquestionably fosters an important governmental interest . . ." and (3) ". . .the regulation, properly viewed, is not content orientated. . . ."

The Court realized that the ban was defined by reference to the subject matter of bill inserts, *i.e.,* controversial matters of public policy; however, it found (J.S. App. 11a):

> . . . [I]t does not discriminate against persons of any particular political stripe or prohibit the expression of any one position on a hotly debated issue. In short, the restriction endeavors, in an objective and even handed

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[3] This Court has approved a similar test in *United States v. O'Brien,* 391 U.S. 367, 377 (1968), where it upheld O'Brien's conviction for burning his draft card:

> . . . [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest . . ..

Here, as in *O'Brien,* the Commission's prohibition relates to both speech and non-speech elements. The Commission is only secondarily concerned with the subject matter of Consolidated Edison's communications; the focus of the Commission's concern is primarily preserving the bill insert for its basic function of providing important, non-controversial information to consumers. Consolidated Edison is simply wrong when it asserts (Br. pp. 14-15) that the harm sought to be avoided by the ban is the communicative content of the bill insert.

manner, to limit billing insert materials to the innocuous and noncontroversial. Given these circumstances, where the communication intrudes upon the privacy of the home, such a limitation does not offend the First Amendment (*Erznoznik v. City of Jacksonville,* 422 US 205, 209; see *Greer v. Spock,* 424 US 828, 838-839; *Lehman v. City of Shaker Heights,* 418 US 298, 302-304; see, Tribe, American Constitutional Law, § 12-21, at pp. 690-691, & n 21).[4]

In a similar vein, Judge Pratt also concluded (Commission's App. 31-40) that the Commission's ban was akin to a time, place and manner restriction, finding that it leaves open ample alternative channels of communication and fulfills important governmental interests. Judge Pratt gave considerable attention to the "contents" aspect of the Commission's order. In a lengthy analysis of this Court's decision in *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974), Judge Pratt noted that the Court had upheld a content-based restriction when allowing the City of Shaker Heights to refuse political advertising in vehicles of the city transit system. He concluded that there were even more reasons in the present case for a ban than there were for the one upheld by this Court in *Lehman.*

This Court was narrowly divided in *Lehman* with four Justices in favor of declaring the restriction unconstitutional. However, the issue that split the Court in *Lehman*—the

[4] Consolidated Edison argues that under the approach of the New York Court of Appeals (Br. p. 15) ". . . the State may suppress debate on all public issues, so long as the prohibition is applied in an 'evenhanded manner'. . . ." Of course, that argument has no relationship to this case where the utility's management may exercise its right to speak out on controversial issues in fora other than bill inserts. Consolidated Edison's argument is totally belied by the very nature of the Commission's bill insert ban. There simply has been no attempt on the part of the Commission to suppress free speech by utilities.

question of whether the city had created a public forum requiring that it be opened to all—is not present here. In fact, as Judge Pratt found in *Long Island Lighting* (Commission's App. 39), one reason for the Commission's restriction is to prevent bill inserts from becoming a public forum open to all so that the billing process is diverted from matters directly related to the rendition of utility service.[5]

We believe that the ban is, in the traditional sense of the terms, neither content neutral nor content based. Rather, the regulation is a subject-matter restriction unrelated to any attempt by the Commission to foster or deter a particular point of view.[6]

The neutrality of the Commission's ban distinguishes it from cases where the government has attempted to foster or suppress a specific point of view or particular information. *See, e.g., Miller v. California,* 413 U.S. 15 (1973) (banning obscenity); *Dennis v. United States,* 341 U.S. 494 (1951) (forbidding advocacy of violent overthrow of the government); *Landmark Communications v. Virginia,* 435 U.S. 829 (1978) (disclosure or publication of specified information).

Subject-matter restrictions have been upheld by this Court where necessary to achieve important state interests. A foremost example is *Lehman v. City of Shaker Heights, supra.* Other examples include *Greer v. Spock,* 424 U.S. 828 (1976) (involving a ban on political campaigning on a military base); *Young v. American Mini Theaters, Inc.,* 427 U.S. 50 (1976) (upholding Detroit's zoning ordinance limiting density of

[5] The public forum issue is discussed further in connection with the state interests underlying the Commission's regulation, *infra.*

[6] For an extended discussion of cases involving subject-matter restrictions, *see* Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions,* 46 Chic. L. Rev. 81 (1978).

theaters showing sexually explicit but not obscene films); and *Rowan v. United States Post Office Dept.*, 397 U.S. 728 (1970) (upholding a statute permitting mail recipients to refuse lewd or offensive materials through the mail). The Commission's ban should similarly be upheld, especially since it poses only a minimal burden on Consolidated Edison's speech and fulfills important governmental interests.[7]

Consolidated Edison attempts to distinguish (Br. pp. 15-16) two of this Court's decisions (*Greer, supra* and *Lehman, supra*) by noting that the speakers in those cases were attempting to obtain access to the government's property to exercise free speech rights while, in this case, the Commission's order prevents the use by Consolidated Edison of its own property for First Amendment purposes. This Court drew no public property—private property distinction in its decisions in *Greer* and *Lehman*.[8] Nevertheless, as we discuss below, the issue in this case is not the prevention of the use of Consolidated Edison's property but, rather, the use to be made of the utility billing process which the ratepayers are required to support. It is unclear why Consolidated Edison's attempted distinction has anything to do with freedom of expression under the First Amendment. The result in each case is the same as with the Commission's ban—a purported speaker is denied access to a particular means of communication.

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[7] *Amicus* Mobil Corporation argues at length (Br. pp. 10-21), a point not raised below, that communication by mail is especially deserving of protection. We agree that communication by mail is frequently entitled to First Amendment protection. The Commission has, however, in no way attempted to censor the mail or interfere with federal regulation of the postal service. Consolidated Edison may still communicate by mail so long as it does not use bill inserts.

[8] This Court has rejected the contention that broadcasters have a First Amendment right to use their licensed facilities to broadcast without regard to reasonable Federal Communications Commission regulation (*Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 386-401 (1969)).

Consolidated Edison also argues (Br. p. 16) that in *Greer* and *Lehman* the restrictions were applied in an evenhanded manner, while here only the utility is precluded from using bill inserts to espouse its position. This argument completely misses the point. The prohibition is addressed to the use of bill inserts by utility management since those are the only parties who would otherwise be able to use the billing process to disseminate their positions. It is wrong for Consolidated Edison to argue that the Commission's ban is unevenhandedly applied since the company has refused to allow other parties to use the billing process to disseminate their views. In fact, the company's refusal to allow the Natural Resources Defense Council and other antinuclear proponents to use the billing mechanism prompted the complaint which led to the Commission's investigation and the resultant order to ban bill inserts. Before the Commission, the company argued vigorously that other parties should not be allowed to use bill inserts (R. 251-254). As we discuss below, the problems of making bill inserts a public forum was one reason for not giving Consolidated Edison's management access to the forum in the discriminatory manner it seeks.[9]

Consolidated Edison also relies (Br. pp. 13-14) on *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), for the proposition that the government may not make a content-based restriction on freedom of expression. That case, however, has no bearing upon the instant litigation. In *Mosley*, this Court decided that Chicago's ordinance banning

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[9] The assertion of LILCO in its *amicus* brief (p. 31) that the public forum issue is not before this Court is simply wrong. The Commission clearly predicated its ban in part on the adverse effects that would result from giving opposing points of view access to the billing mechanism (J.S. App. 66a-67a).

all picketing within a certain distance from schools except for labor picketing was impermissible because it singled out one area of expression for favorable treatment without any showing that the reasons for banning other picketing—alleged disruption of school activity—did not apply equally to the labor dispute picketing. This Court has, however, upheld restrictions on picketing that were not discriminatory. *See,* for example, *Grayned v. City of Rockford,* 408 U.S. 104 (1972), decided contemporaneously with *Mosley.* Here, the Commission has not discriminated against any one viewpoint or speaker, but has applied an evenhanded restriction on the use of the billing mechanism, preserving its use for materials closely related to utility functions. The unsupported differentiation present in *Mosley* is not present here.

Consolidated Edison has thus simply not shown that the Court of Appeals, insofar as it concluded that the Commission's ban was a permissible subject-matter restriction, was incorrect. To the contrary, the prior decisions of this Court demonstrate the correctness of the Court of Appeals' conclusion.

B. The Order Imposes Only A Minimal Burden On Consolidated Edison.

The Commission's ban relates to only one form of communication—bill inserts (messages enclosed with service bills). Consolidated Edison and all other utilities are not prohibited from using alternative means of communication. The Commission stressed (J.S. App. 67a):

> We have not, of course, prohibited the utilities from expressing their corporate opinions on controversial public policy issues in any other media. They are free, like all other members of our society, to explain their positions on radio and television interviews, to seek to purchase space in newspapers, and to speak before public gatherings. . . .

There can be no question that the New York Court of Appeals and Judge Pratt were correct in concluding that the ban leaves open "ample alternative channels for communication". *Virginia State Board of Pharmacy, supra* at 771.

The Court of Appeals' decision, concluding that there are ample alternative channels for communication, is in no way in conflict with this Court's determination in *Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85 (1977), where this Court restated its prior holding (431 U.S. at 93) that ". . . laws regulating the time, place, or manner of speech stand on a different footing from laws prohibiting speech altogether. . . ." (Citations omitted.) That case involved the placement of "for sale" signs in front of residential property. The Court determined that the banning of the "for sale" signs was not needed, in the factual situation existing in *Willingboro,* to fulfill the governmental interest sought to be advanced by the ordinance, *i.e.,* stabilization of racially integrated housing. This factual context appears to have been critical since the Court (431 U.S. at 95 n 9) did not criticize the decision in *Barrick Realty, Inc. v. City of Gary,* 491 F.2d 161 (7th Cir. 1974), where panic selling had occurred. The Court also stressed (431 U.S. at 93-94) that an additional problem with the argument that there were ample alternative channels of communication was that the town was not, in fact, concerned with forms of communication, but rather, with the message on the sign. In the instant case, the Commission's concern is with the use of the form of communication and not the message which may be conveyed in any other manner than bill inserts.

In this case, not only is the regulation not viewpoint oriented, but there are sound public interest reasons for the restriction on the one hand and there is no realistic evidence, on the other hand, that Consolidated Edison has been

deprived of the cheapest[10] or most effective[11] means of communication. Consolidated Edison's argument (Br. pp. 24-25) that it has been foreclosed from the most economic means of disseminating its information rests upon the totally unjustified assumption that only the out-of-pocket or incremental costs of producing bill inserts will be assigned to the utility's shareholders.[12] It assumes that utility ratepayers should be required to contribute the costs of postage, en-

[10] In any event, Consolidated Edison is not constitutionally entitled to use any means it desires to communicate. This Court has upheld restrictions on expression, even in public places usually deserving of protection, despite claims that the restrictions were in the most appropriate location for communication, (*Adderley v. Florida*, 385 U.S. 39, 48 (1966), citing *Cox v. Louisiana*, 379 U.S. 536 (1965)), or the easiest and cheapest means of communication (*Kovacs v. Cooper*, 336 U.S. 77, 88-89 (1949)).

[11] LILCO states (Br. p. 8) that the Commission has found bill inserts so effective it has ordered their use rather than newspaper advertisements to inform customers of rate increases. This is not true. The Public Service Law requires newspaper advertising of proposed rate changes. The requirement for notice of rate increases in bill inserts is simply supplemental.

[12] The allocation issue is discussed at length, *infra*. The Commission, as we will explain there, has declined to allocate costs for using the billing process between the company and its ratepayers. Assuming *arguendo* that some allocation were realistic, it would be reasonable ratemaking and within the Commission's statutory powers to allocate a considerable portion of postage and other mailing expenses to the company if it uses the billing process for political purposes. If an allocation of other expenses is made, the cost of using the billing process will be much higher than using alternative means of communication such as newspapers. For example, based upon Consolidated Edison's cost estimate (App. 15-18) if one-half the postage costs of a monthly billing were allocated to the company, the cost would be $105,000 compared to $30,300 to run a full page ad in the New York Times, The Daily News and the Westchester Rockland Newspaper Group, newspapers that cover Consolidated Edison's service territory. Apparently, Mobil Corporation an *amicus* herein believes that newspaper advertising is effective since it effectively runs advertisements on controversial issues in the New York Times (Mobil Corporation, Br. pp. 4-5).

velopes, assembling the computerized mailing lists and all other expenses associated with the billing process so that its management may use this ratepayer-financed facility to provide a free ride for the dissemination of its management's views. The "bottom line" of Consolidated Edison's argument is not that it cannot communicate by all other means including separate direct mailings, but rather that it wants free use of the ratepayer-financed billing mechanism to defray the cost of disseminating its views. Any economies that Consolidated Edison assumes it will achieve by using the billing process would thus be the result of foisting the costs of the mailing onto its ratepayers.

C. The Commission's Order Fulfills Important State Interests.

In addition to finding that the Commission's bill insert ban was an evenhanded restriction which foreclosed only one channel of communication, the New York Court of Appeals also found (J.S. App. 10a) that order fulfilled important state interests, thus meeting the third criteria for a "time, place and manner" restriction. The State interests sought to be achieved by the ban involve both practical problems encountered in other contexts by this Court and other issues of a more technical regulatory nature having particular significance because of the status of Consolidated Edison as a regulated monopoly.

Consolidated Edison (Br. pp. 17-21) when discussing governmental interests underlying the Commission's bill insert regulation either ignores or misconstrues the bulk of the Commission's findings. The order relates to materials sent with utility bills. Consolidated Edison, of course, has the ability to bill most of the residents in its service area only because it is a franchised monopoly having the right to serve most of New York City and a portion of Westchester County. No other utility may legally offer service in competition with Consolidated Edison. One of the necessary adjuncts of

providing utility service is the billing function which enables the utility to receive payment for service rendered. Since the billing process is a part of providing utility service, Consolidated Edison is legally entitled to receive rates designed to pay for it (New York State Public Service Law, § 66). Therefore, a portion of each ratepayer's utility payment pays for the cost of the billing. Consolidated Edison, however, has used and desires to continue to use the billing process for a non-utility purpose, a mechanism to provide a free ride for inserts concernings its management's views on nuclear power and other controversial issues.

1. Allocation Of Limited Space.

Confronted with this background, the Commission discussed several concerns, which are largely interrelated, that it believed required restricting the billing packet to utility service-related messages. A primary concern (J.S. App. 43a, 65a-66a) was that the billing packet be used most effectively to provide information on utility service of aid to consumers, including energy conservation suggestions, safety tips, complaint procedures and the rights of consumers. As the New York Court of Appeals found (J.S. App. 6a), the Commission has been charged with the duty under the Public Service Law, Section 66(12)(a), to assure that the format and information requirements of bills rendered by New York utilities are rendered in a manner insuring simplicity and clarity. In the discharge of its obligations, the Commission concluded that the utility billing process would best serve the ratepayer if political messages were excluded. The Commission seeks through its restriction to avoid the situations where use of space for political messages would disrupt the utility billing process and deprive utility customers of service-related information by usurping the limited space available (J.S. App. 65a-66a).

This Court has noted several times that allocation of scarce spacial resources is an important governmental interest which may be achieved by regulation of communication. It was one factor listed by Justice Blackmun in *Lehman v. City of Shaker Heights, supra* at 418, when the Court upheld Shaker Heights' ban on political advertisements. The Court has also confronted the limited space problem in the broadcast industry. When upholding the fairness doctrine in *Red Lion Broadcasting Co. v. F.C.C., supra,* the Court noted the need to regulate communication because not everyone can have unlimited access to radio and television frequencies. The space problem was also a factor discussed in *Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94 (1973), where this Court refused to require that radio and television stations sell time to responsible entities to present their views on public issues.

As we discuss in connection with the cost allocation problem, *infra,* the Commission would have no way of assuring that messages directly relating to utility service have not been omitted or abridged in order to accommodate political pamphleteering by a utility. The Commission would thus provide no assurance to the ratepayers that the billing process which they underwrite is being used to serve their interest. The problem of space allocation would be even more acute if the billing packet were opened up to opposing points of view as might well be necessary if Consolidated Edison could use its billing process to further its side of a political debate. The Commission would then be inundated with requests to accommodate opposing messages covering varying points of view. Judge Pratt was clearly correct when he concluded (Commission App. 40) that, by restricting the use of bill inserts, the Commission could ". . . avoid being enmeshed in a wide variety of issues and considerations that are not directly related either to the regulatory responsibilities of PSC or to the business of the utilities it regulates."

2. Avoidance Of A Captive Audience.

In conjunction with problems presented by the limited bill insert space, the Commission determined, as another ground for its bill insert prohibition, that using the billing mechanism to disseminate management's views ". . . is tantamount to taking advantage of a captive audience, since the consumers cannot avoid receiving the literature with the utility's message. Regardless of whether consumers read the material, it is basically unfair to subject ratepayers who disagree with the utility's viewpoint to the arguments of the utility through its billing mechanism. . . ." (J.S. App. 43a).

The New York Court of Appeals agreed with the conclusion.

> . . .Consumers of utility services, like many others in captive situations, have no choice concerning receipt of a periodic statement from the power company . . . when the insert espouses the utility's viewpoint on a controversial question, it is as likely to offend the sensibilities of the recipient as it is to elicit agreement. Government need not stand idly by and deny assistance to those who are inflamed by having a particular opinion foisted upon them. . . . (J.S. App. 10a).

Consolidated Edison (Br. pp. 17-20) argues that the captive audience argument does not support a restriction on its freedom of speech. In so doing, the company attempts to isolate the captive audience argument from the other grounds discussed by the Commission and fails to deal seriously with the captive audience concept in the context of the bill insert issue.

The company is obviously right when it argues that none of its ratepayers are forced to read the bill inserts they receive and it is doubtless true that many customers merely take bill

inserts and dispose of them promptly in their trash can. These customers, of course, cannot be offended by anything that appears in a bill insert since they are unaware of its content. Surely, however, the company cannot be arguing that all of its customers follow this course of action. If this were the case, the use of bill inserts would merely be an exercise in frustration since there would be no readers for the material.

For those customers who act otherwise and, upon opening their monthly bill from Consolidated Edison, also glance at or read the contents of the accompanying bill insert, the situation is much different. Those customers have the opportunity to learn about complaint procedures, be notified of rate increase proposals, safety tips and ideas about energy conservation which may enable them to save money and be provided better utility service. The Commission's order is designed to assure that the bill insert is used, in fact, for those purposes. Thus, it is important that the recipient is not deterred from reading the insert because of the presence of extraneous material.

The ratepayer who pays the costs of the mailing process is rightly entitled to information relating to the local utility. If the utility is also allowed to place in its bill insert political messages espousing the viewpoints of its management, the ratepayer who reads the bill insert will, in order to receive information relating to utility service, also be exposed to the utility's political messages. The Court of Appeals found that ratepayers may well find the utility's position to be offensive. The resulting reaction of the utility subscriber may be outrage so that the customer immediately discards the insert and thereby loses out on information of direct use to him as a utility consumer. This result will be achieved despite the fact that the very consumers who may be outraged are forced through their utility bills to pay the cost of the mailing.

As we discuss in connection with the subsidy issue, *infra*, there is no case in which this Court has required that a citizen finance the dissemination of materials with which he does not agree. In the bill insert situation, not only would there be compelled subsidization for management's views if appellant's approach were adopted, but the billing process would also be designed to foist the company's views upon the ratepayer since bill inserts are intended to be read for the important consumer information included.

The Commission's determination that ratepayers are a captive audience for bill inserts is plainly correct. The present case is more of a captive audience situation than that in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), where the Court upheld the decision of Shaker Heights to refuse political advertising in its mass transit system. There, the relief sought was to compel the city to accept paid political advertising that would be placed in city-operated buses. Justice Blackmun noted that the city's refusal to accept political advertising, although it accepted other types of advertising, was permissible because ". . .[t]he city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favortism, and the risk of imposing upon a captive audience." (418 U.S. at 304).

In the *Lehman* situation, while riders on the transit system would not have been forced to read political advertising even if the city had accepted it, they would have been exposed to the advertising when they stepped on the bus. In the present case, utility subscribers will merely have to open their utility bills (which they must do in order to continue receiving utility service) in order to be exposed to the bill insert. If the utility subscriber chooses to read the bill insert at all in order to

receive information about utility service, he or she will also be exposed to political arguments of the utility. The Commission's legitimate desire to enhance the prospect that bill inserts be used by consumers to obtain information with respect to problems relating to utility service is an important state interest which supports restricting the usage of bill inserts to utility service messages.

Moreover, the ratepayers here will be exposed to material in their homes if utilities are permitted to use bill inserts to convey controversial messages. This Court has frequently noted that privacy in the home is entitled to protection even as opposed to the First Amendment right of others to communicate. *Rowan v. United States Post Office Department*, 397 U.S. 728 (1970); *Cohen v. California*, 403 U.S. 15 (1973); and *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978).

Apparently, Consolidated Edison is of the opinion (Br. p. 18) that the content of its bill insert could not be offensive to any of its ratepayers. Offensiveness is, however, clearly something to be judged by the recipient of the material and not by the sender. In *Rowan*, this Court noted that the recipient of a dry goods catalog could find the material offensive. Certainly, recipients of pronuclear power advertising could also find the material offensive in light of today's wide ranging controversy over the safety and reliability of this form of energy.

In the instant case, where the ratepayer may not only find the material offensive, but also be compelled to support its dissemination into his or her home, the rights of the ratepayer should certainly be weighed heavily against the right of the utility to use one specific means of communication. The ratepayer who has no alternative but to receive bills from a state-created monopoly is in a more captive situation deserv-

ing of constitutional protection than is the bus rider in *Lehman*, the radio listener in *Pacifica*, or the advertising mail recipient in *Rowan*.

LILCO also discusses (Br. pp. 9-20) a number of aspects of the captive audience and privacy issues. Its wide-ranging discussion wholly fails to address the specific issue before this Court—the case where a recipient of literature is required to pay for its distribution to his or her home in order to continue to receive vital services from a state-created monopoly. We agree with many of LILCO's generalizations, but believe that they are inapposite to this case. There has simply been no attempt to shield persons from offensive ideas; rather, the Commission's order seeks to assure that ratepayers are not compelled to finance dissemination of controversial material and that they receive needed information from the utility, not limited by the utility's desire to use the limited space to express management's political views.

LILCO's suggestion (Br. p. 18) that a regulatory agency may not bar material from the home even if an individual could do so under *Rowan v. United States Post Office Department*, 397 U.S. 728 (1970), ignores the nature and purpose of bill inserts. The bill insert is part and parcel of the billing process and contains material required by regulation to be supplied to customers. There is thus no option to refuse to receive the bill insert. LILCO's suggestion that controversial material *only* could be removed from bill inserts for some customers at their request thus would require duplicate printing, a procedure that seems totally unrealistic and not one urged by any utility. In its suit, LILCO has suggested selective removal of the entire bill insert at a customer's request, but that suggestion would obviously deprive customers of necessary information and be inconsistent with the obligation imposed on the utility to supply certain information to its customers.

3. Elimination Of Free Ride And Forced Subsidy.

The Commission also determined (J.S. App. 67a) that barring the billing process to political messages would prevent the ratepayers from providing a free ride to utility management by subsidizing the dissemination of management's views (with which they may not agree) with utility payments that support the cost of the billing process. Consolidated Edison has agreed to pay incremental costs of producing the billing pamphlet itself but has not agreed that any other allocation of costs to utility management would be appropriate.[13] In this circumstance, the result would be that the ratepayers would pay for the cost of postage, envelopes, assembling the computerized billing list and all other expenses related to a monthly or bi-monthly mailing. Management and the utility's shareholders, without any cost to them, would receive the benefit of the billing mechanism which would provide the means to disseminate their views on controversial issues of public policy.

There is no authority for the proposition that one party is entitled to a free ride for its propaganda at the expense of another party who is compelled to pay the expense. A subsidy would be inconsistent with the Commission's Uniform System of Accounts allocating political expenses to the utility's shareholders[14] and decisions

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[13] Consolidated Edison has previously argued (Ct. of Appeals Br. pp. 22-24) that any allocation of mailing costs to shareholders would be an unconstitutional penalty as a tax on its freedom of speech. LILCO also seems to challenge (Br. p. 24) any allocation of the billing mechanism costs.

[14] Account 426.4, Expenditures for Certain Civic, Political and Related Activities provides:

> This account shall include expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation or ordinances (either with respect to the

(Footnote continued on following page)

of this Court which have determined that one cannot be compelled to contribute to the cost of publicizing another's views. For example, the Court has held that union members may constitutionally prevent the union's spending a part of their required service fees to contribute to political candidates and express political views unrelated to its duties as an exclusive bargaining representative. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). As with the union members in *Abood*, Consolidated Edison's ratepayers would be compelled to subsidize the dissemination of political views unless the billing process is closed for those purposes. While the ratepayer's bill will not be higher if management includes a political bill insert, management would still receive the benefit of the subsidized free ride, a forced subsidy found impermissible in *Abood*. *See also, Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956); *Elrod v. Burns*, 427 U.S. 347 (1976). Similarly, this Court upheld the check-off system for taxpayer contributions to presidential elections only after noting that: "[t]he scheme involves no compulsion upon individuals to finance the dissemination of ideas with which they disagree. . . ." *Buckley v. Valeo*, 424 U.S. 1, 91 n 124 (1976).

It has been argued at various times below that the subsidy problem can be avoided if the Commission would only make an allocation of costs between the company's shareholders

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(Footnote continued from preceding page)

possible adoption of new referenda, legislation or ordinances or repeal or modification of existing referenda, legislation or ordinances) or approval, modification or revocation of franchises; or for the purpose of influencing the decisions of public officials or advancing the political objective of the utility, but shall not include such expenditures which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility's existing or proposed operations.

and the ratepayers. While the Commission specifically declined to make such a cost allocation (J.S. App. 67a), the relevant costs to be allocated would, we believe, include the costs of the billing mechanism that the New York utilities claim they can utilize without cost to them. *See*, n 13, *supra*.

The reasons for the Commission's refusal to allocate costs are several. Most important is the space allocation problem discussed *supra*. Because space for bill inserts is limited and because management has the ability to pick and choose the bill inserts to include and their scope, there simply can be no assurance that consumer information relating to utility rates and service has not been omitted or truncated in order to accommodate political messages on behalf of utility management. Service-related messages may simply be foregone in order to accommodate the desire of management to advance its position on controversial issues. In those circumstances, a cost allocation would be of little meaning since the consumers would be deprived of information they otherwise would have received.

A second problem with making a meaningful cost allocation here that would negate a perception that management was obtaining a free ride is the nature of the ratemaking process itself. In evaluating expenses to be paid by the ratepayers of regulated utilities, the Commission attempts to ascertain whether the expenses are reasonable and whether expenses are related to public service functions and therefore attributable to the ratepayers. If the expenses are not related to utility service, they may not, in accordance with the Commission's Uniform System of Accounts, be charged to the utility's ratepayers. Non-utility expenses are not taken into account for ratemaking purposes when the Commission determines the revenue requirement of a utility and the company's

shareholders would be required to pay for those expenses out of its retained earnings. The distinction between shareholder-related expenses and expenses to be borne by the ratepayers is commonly termed a "below-the-line expense" (those attributed to shareholders) and an "above-the-line expense" (those attributed to the ratepayers).

While the "above-the-line", "below-the-line" categorization provides a theoretical basis for ratemaking,[15] its application here will not provide a realistic solution to the subsidy problem.[16] The Commission sets rates for the future based upon past expenses and reasonably anticipated changes. Thus, Consolidated Edison can, if it chooses, avoid any loss of earnings caused by a Commission allocation of expenses to management by reducing other expenses, including those directly relating to the rendition of utility service. In other words, an assessment of expenses directly to management may be a meaningless exercise, particularly when expenses are only a miniscule portion of the company's overall operating costs.

[15] But see a discussion of the above-the-line, below-the-line problem by then Chairman Kahn (J.S. App. 48a). Chairman Kahn, while concurring in the bill insert limitation, would have allowed pronuclear advertisement by other means to be accounted for above-the-line, noting that unless disallowed (which he did not favor) the costs would realistically be borne by ratepayers in any event (J.S. App. 54a-56a).

[16] LILCO's argument (Br. pp. 23-24, footnote) attacking the allocation problem notes that ". . . the relatively small sums involved in this case cannot possibly affect future ratemaking computations. . . ." LILCO thus agrees that allocations would be meaningless, precisely the point we have been urging below. Nor, as LILCO contends, does the argument prove too much. In the case of other political expenses (*e.g.*, lobbying), there is neither a specific, additional subsidy from the ratepayers as in the case of bill inserts where all of the embedded costs of a mailing are included in utility rates, nor a restricted space problem. It is the combination of the circumstances here that would render any attempt at allocation essentially meaningless.

If it were possible, however, to make a meaningful allocation, it would, contrary to the claims of the utilities, be reasonable to include as part of the allocation more than merely the out-of-pocket expenses attributable to printing and other related activities required to produce and mail a bill insert discussing management's views on controversial matters. Aside from other considerations discussed above, there would clearly be an economic benefit to management if it could enclose bill inserts solely on an incremental cost basis, riding freely on the ratepayer-financed billing mechanism so that management could avoid postage, envelopes, and other costs attributable to a mailing. Cost allocations necessitated by the sharing of a common facility for multiple parties or purposes normally reflect more than the incremental cost to a joint user in the utility industry. For example, when electric utilities sell surplus energy to other utilities, the utilities charge more than just the cost of producing energy but also add an additional charge to reflect the value of service received by the purchasing utilities. Here, an allocation of embedded expenses reflecting the benefit to utility management of using the billing process would, similarly, be in order.

The company's contention (Br. p. 21) that the ratepayers will pay no more if political bill inserts are enclosed is, (as we have discussed, *supra*), no answer to the subsidy problem.[17]

[17] LILCO also argues (Br. pp. 25-26) that this case does not present a subsidy issue. This view is to be contrasted with its further argument (Br. p. 34) that if it is compelled to open the billing process to others it ". . . would in effect, be required to subsidize its opponents' messages by including them in its billing process. . . ." Of course, in each case the parties paying for the mailing process are LILCO's ratepayers. LILCO's citation of *Walz v. Tax Commission*, 397 U.S. 664 (1970), where the Court determined that tax exemptions to religious institutions are not subsidies in violation of the Establishment Clause is not in point. This Court was plainly concerned with arguments unique to religious institutions and the particular Constitutional history involved.

There does not have to be an out-of-pocket payment in order for there to be a subsidy. For example, Congress has acted to control the use of the franking privilege (39 U.S.C. § 3210 (a)(5)(C)(D)) and fourth class postal rates (39 U.S.C. § 4554(a)(1) and § 4555(a)) to assure that no subsidy is provided to the sender for improper purposes even though it would cost no more for the postal service to handle prohibited materials enclosed in the franked or discount envelopes. And, as noted above, utility rate practices belie the suggestion that the beneficiary of an available benefit should only pay for incremental costs. While the billing mechanism is, in the Commission's view, not the proper forum in which utility opinions on political or controversial matters should be disseminated, the ratepayers should at least get full value for the mechanism they would be providing. In that case, however, the monetary advantage of using bill inserts would, at best, be insignificant. *See supra,* p. 16 n 12.

Consolidated Edison also contends (Br. p. 21) that the matter of cost allocation is irrelevant because the Commission's ban on bill inserts would apply even if the shareholders pay for it in full. The contention is misleading because the Commission has not banned the company from making separate mailings to its ratepayers provided that the shareholders pay the costs. The Commission's language referred to by Consolidated Edison (J.S. App. 43a) was obviously concerned with payment in full for the bill insert only. Since none of the utilities ever suggested they would pay for the entire bill insert, including its mailing, the Commission never dealt with the postulated situation. Indeed, the situation is academic inasmuch as the utilities have made it clear that the use of the billing mechanism is desired principally because it is inexpensive.

The Commission also faced a related problem when it considered the free ride—subsidy issue. The New York State Public Service Law (Section 65(3)) prevents discrimination in the use of the billing process by management:

> No gas corporation, electric corporation or municipality shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

There is no exemption under the antidiscrimination section of the law for utility management. The use of the billing process for political purposes would obviously give management a benefit unavailable to others, as long as the use of bill inserts is not available to anyone else. Consolidated Edison strongly opposed (R. 251-254) letting other parties enclose messages. The Commission found that (J.S. App. 64a-65a) use of bill inserts by management confers an "undue advantage" and that the practice should be eliminated.[18]

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[18] LILCO (Br. pp. 20-23) sets forth a picture of the Commission as the purported equalizer of speech resources. This argument misses the point. The Commission is not concerned about LILCO's relative ability to tout its position on controversial matters. Rather, the Commission is concerned that ratepayers are not compelled to pay for this process as part of their required service rates. LILCO's purported willingness to bear all the costs associated with political bill inserts (Br. p. 24) still does not solve the spacial allocation and rate allocation problem discussed herein. LILCO has never suggested that it would be willing to bear any substantial costs of the mailing itself, such as half the costs of a mailing that might be reasonable on a sharing of the benefits basis if it were to use a bill insert for political purposes.

4. Avoidance Of A Public Forum.

Finally, the Commission was also confronted with a request by the Natural Resources Defense Council and others to open up the billing envelope to opposing points of view if utilities were permitted to use bill inserts for political purposes (App. 32-33). The proponents of open access prepared a response to a Consolidated Edison January 1976 bill insert on nuclear power (App. 38-43). They requested that it be included in a subsequent bill insert. The Commission rejected the open access approach stating (J.S. App. 66a-67a):

> . . .[W]e were all convinced ultimately that it would be difficult to administer fairly,[1] and would tend to lessen undesirably the number of bill inserts dealing directly with such useful and uncontroversial information as consumer conservation measures.

[1] We note that no utility company has submitted to us a proposal for handling controversial issues in bill inserts in this manner.

The Commission thus chose to restrict the billing process to utility service related matters rather than create a public forum to carry on political dialogues. Judge Pratt agreed that this was an important state interest supporting the Commission's ban (Commission App. 39-40). There is a clear likelihood both under New York law and federal decisions that if the Commissision allows use of the billing process for political discussions other points of view must be allowed on an equal footing. For example, the New York Court of Appeals has held that state sanctioned use of a facility for the use of one party converts the facility to a public forum which may

be used by all. *East Meadow Community Concerts Association v. Board of Education,* 18 N.Y.2d 129 (1966).[19]

A situation similar to the bill insert problem is found in *Bonner-Lyons v. School Committee of City of Boston,* 480 F.2d 442 (1st Cir. 1973). In that case, the school committee had used the internal distribution system of the city schools to disseminate notices opposing the use of busing to achieve racial integration. On the other hand, the plaintiffs who wanted to organize a pro-busing rally were denied the use of the distribution system. The court stated (480 F.2d at 444):

> . . .[I]t is well settled that once a forum is opened for the expression of views, regardless of how unusual the forum, under the dual mandate of the first amendment and equal protection clause neither the government nor any private censor may pick and choose between those views which may or may not be expressed. [Citations omitted.]

Even though utility facilities are not public facilities, sanctioning by the Commission of political discussions, particularly if the bulk of the cost of disseminating those discussions is (as the utilities claim it should be) provided by the ratepayers, will create a situation no different in result than that in cases where public forums have been established in publically owned facilities. In addition, the anti-

[19] Despite LILCO's arguments to the contrary (Br. p. 31), Commission approval of the use of political bill inserts would probably provide the necessary state action to create a public forum. *See, Jackson v. Metropolitan Edison Co.,* 419 U.S. 345 (1974). State action might exist under the New York State Constitution if the Commission sanctions the use of political bill inserts even if it did not exist under the United States Constitution. *Sharrock v. Dell Buick,* 45 N.Y.2d 152 (1978).

discrimination provision of the Public Service Law discussed *supra,* shows a strong state interest in equal treatment in the use of utility facilities.

II. The Commission's Standard For Restricting Bill Inserts That Involve "Controversial Matters Of Public Policy" Is Sufficiently Specific.

Consolidated Edison also argues (Br. pp. 26-27) that the Commission's ban is void for vagueness. However, it suffers from none of the vices alleged. It will not trap the innocent by failure to provide full warning. Consolidated Edison and all other utilities are aware of what is prohibited by the ban. The Commission has determined (J.S. App. 68a) that two areas, the controversy over nuclear power development and the controversy over public ownership of utility facilities, fall within its ban. Further guidance is provided by the Commission's long-standing Uniform System of Accounts, Account 426.4 set forth *supra,* p. 25 n 14. Judge Pratt found that (Commission's App. 29):

> . . .[I]n context the phrase is a synonym for the "political advertising" for which expenditures are recorded in Account 426.4. Interpretation of what is "controversial" or "non-controversial" may be governed by those considerations which determine expenditures recorded in that account. PSC has already had some expertise, and the public utilities some guidance, on what matters are considered "political" and thus subject to recording in Account 426.4; these interpretations may similarly be used as guidelines in determining what is or is not "controversial".

The standard is also not subject to arbitrary and discriminatory enforcement. Any Commission determination is subject to expeditious judicial review pursuant to Article 78

of the New York State Civil Practice Law and Rules. In addition, the standard does not inhibit exercise of First Amendment freedom because it provides adequate guidance as to what is prohibited.

On rehearing, the Commission offered (J.S. App. 68a) to provide prompt advisory rulings on whether a subject fell within its ban. Consolidated Edison (Br. p. 27) criticizes the offer as censorship. The utility need not seek advance guidance if it does not desire it. The Commission was merely trying to be helpful recognizing that it is dealing with supposedly responsible entities in the context of a regulatory environment. Moreover, New York's utilities are not like demonstrators or others whose spontaneous activities may be inhibited if they wait for official sanction before engaging in political activities.[20]

The Commission's standard is virtually identical with that upheld by the Supreme Court in *Red Lion Broadcasting v. F.C.C.,* 395 U.S. 367, 395-396 (1969)[21] In that case, the Court rejected a challenge to the Federal Communications Commission's fairness doctrine, finding that the standard used by

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[20] LILCO (Br. pp. 43-44) criticizes the Commission's offer as vesting arbitrary powers in its staff. No where in the record is there any indication that the advisory opinions will be provided by staff. They will be provided, as promised, by the Commission.

[21] LILCO's attempt to distinguish *Red Lion* (Br. p. 44, n 23) deals only with the consequences of falling within the standard adopted. It cannot deny that the provision is virtually identical with that in the present case. LILCO also refers to *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978). As Judge Pratt found (Commission App. p. 30) that the case was "readily distinguishable" since the rejected standard there had no prior history of interpretation or guidance.

the FCC, "controversial issues of public importance," was not unconstitutionally vague. Furthermore, in *Abood, supra,* this Court noted (431 U.S. 240, n 41), that the union had adopted, as a corrective measure, an accounting procedure allowing a dissenting employee to protest the expenditure of his agency shop fee for " '. . .activities or causes of a political nature or involving controversial issues of public importance only incidentally related to wages, hours, and conditions of employment. . . .' " The Court expressed no concern with the standard adopted by the union.

Conclusion

For the above reasons, the decision of the Court of Appeals of the State of New York should be affimred in all respects.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

APPELLANT'S REPLY BRIEF

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I

The Court of Appeals Erred in Holding That the Commission's Ban Is Not a Content-Based Regulation.

Appellee's brief defends the decision of the court below on essentially the same grounds, and in reliance on the same authorities, as are set forth in the court's opinion. Thus, Appellee argues that its bill insert ban is not content related and is a valid time, place and manner restriction (Br. at 8-14). We addressed these issues at pages 12-17 of our initial brief to this Court and find no need to repeat our arguments here. In our view, a prohibition expressly directed to speech on controversial matters of

public policy is plainly and inescapably based on content and cannot be the subject of a constitutional time, place and manner regulation. It was the erroneous holding of the court below on this issue that served as the basis upon which the Commission was relieved of complying in that court with the standards established by this Court for justifying a prohibition on expressive activity of the kind here involved. Those standards require that such a prohibition must survive exacting scrutiny, that encroachment upon freedom of speech cannot be justified upon a mere showing of a legitimate state interest but the interest advanced must be of vital and compelling importance, and that the burden is on the state to show the existence of such an interest. *Elrod* v. *Burns,* 427 U.S. 347, 362 (1976); *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 786 (1978). The Commission has not met these standards in this case.

The Commission's brief also seeks to sustain the decision of the court below by the novel argument that, notwithstanding the broad sweep of the bill insert ban, "There simply has been no attempt on the part of the Commission to suppress free speech by utilities." Br. at 10 n.4. We find no authority for the proposition that a content-based suppression of speech can be cured of its constitutional infirmity by the state's disavowal of an intent to violate the First Amendment. Whatever the Commission's intent may have been, the *effect* of its order was, and continues to be, a severe abridgment of Con Edison's freedom of expression.

The Commission asserts that its bill insert ban is "neither content neutral nor content based." Br. at 11. Yet the Commission follows this statement with the claim that the "neutrality" of its ban distinguishes it from cases where the government has attempted to foster or suppress a

specific point of view or particular information. *Id.* Not only is this argument internally contradictory but it also appears to embody the fallacious concept that the broader the suppression, the lesser the infringement of First Amendment rights. The decisions of this Court do not permit this concept as they have consistently held that in the area of protected speech the state, even after sustaining its burden of justifying the restriction, "must employ means 'closely drawn to avoid unnecessary abridgment.'" *First National Bank of Boston* v. *Bellotti, supra,* 435 U.S. at 786 and cases cited therein.

The Commission argues that its ban does not discriminate against any one viewpoint or speaker but is an evenhanded restriction on the use of the billing mechanism (Br. at 14). The fact is, however, that the ban applies only to utilities and inhibits the expression of only the utilities' views. The State of New York, by this action of its Public Service Commission, has singled out utilities for this restriction which it has not applied to any other industry, group or person. The Commission's "evenhandedness" argument is groundless.

In summary, we believe that Point I.A. of the Commission's brief completely fails to support the caption which states that "The Commission's Regulation Is A Subject-Matter Restriction Frequently Permitted By This Court." Br. at 8. The bill insert ban is clearly a content-based restriction on freedom of speech and the court below erred in treating it as a time, place and manner regulation.[1] Under these circumstances, the ban must be declared to be invalid unless the record discloses that the Commission has sustained its burden of showing the existence of a gov-

[1] The reasons why the Commission's ban cannot be considered to be a valid time, place and manner regulation are set forth at pages 22-23 of our initial brief.

ernmental interest which will be served by the ban and which is of such vital and compelling importance as to warrant the subordination of the utilities' First Amendment rights.

II

The Commission's Ban Has Not Been Justified by a Sufficient Governmental Interest.

The Commission contends that Con Edison's status as a regulated monopoly has a "particular significance" in evaluating the sufficiency of the various state interests which the Commission has advanced. Br. at 17-18. The fact that Con Edison is heavily regulated has no relevance to First Amendment analysis. The pharmacists in *Virginia Pharmacy Bd.* were subject to what the Court characterized as "extensive regulation," yet the Court invalidated a restriction on their right to advertise the prices of prescription drugs. In so doing, the Court focused not on the source of the drug price information, but on the First Amendment values served by that information. Similarly, in *Bellotti*, the Court concluded that

> The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.

First National Bank of Boston v. *Bellotti, supra,* 435 U.S. at 777.

Also, the Commission characterizes Con Edison's use of bill inserts for the expression of its views as a "non-utility purpose." Br. at 18. Nothing could be further from the truth. The Commission's order prevents Con Edison from communicating with its customers by means of bill inserts

on many vital matters directly related to their mutual interests in connection with the rendition of utility service. For example, the Commission has ruled that the subject of nuclear power is covered by its ban (J.S. App. 43a). However, for Con Edison, the owner and operator of a nuclear power plant, the subject of nuclear power is directly related to the rendition of utility service. The operation of that plant affects the safety, reliability and cost of utility service. Examples of other matters directly related to the rendition of utility service, but to which the Commission's ban probably applies simply because they are controversial, are the use of coal for boiler fuel at power plants to decrease dependency on expensive and unreliable sources of foreign oil, the need for development of synthetic fuels, new sources of natural gas and new energy technologies, the effect of environmental costs on utility rates, and other similar issues. It is essential that utility customers not be deprived of an important source of information on such topics.

The various state interests advanced by the Commission are insufficient, taken singly or in the aggregate, to justify the bill insert ban. A review of the Commission's contentions makes it plain that none of them satisfies the applicable standards established by the decisions of this Court.

"Avoidance Of A Captive Audience."

The court below treated utility customers as a captive audience whose privacy rights require protection from bill inserts espousing a utility's viewpoint on a controversial question. This was the sole governmental interest relied upon by the court to sustain the ban (J.S. App. 9a-11a). The Commission relegates this justification to second place in Point I.C. of its brief (Br. at 20). Our initial brief addresses this issue at pages 17-20 and we rest on our argu-

ment as there set forth. The Commission has wholly failed to show that the bill inserts will invade "substantial privacy interests . . . in an essentially intolerable manner." *Cohen* v. *California,* 403 U.S. 15, 21 (1971).

"Allocation Of Limited Space."

The Commission argues that its primary concern in imposing the bill insert ban was to avoid the situations where use of the inserts for the discussion of controversial public issues "would disrupt the utility billing process and deprive utility customers of service-related information by usurping the limited space available" (Br. at 18).

The Commission's fear that the prohibited bill inserts would disrupt the utility billing process is totally incomprehensible. No explanation is given by the Commission as to how inclusion of a controversial message in the billing envelope would disrupt the billing process, and why inclusion of non-controversial messages in the billing envelope would not disrupt the billing process. This argument is wholly speculative and without any record support.

Similarly conjectural is the Commission's apprehension that the use of bill inserts for the proscribed purpose will interfere with their use for providing other information to the utilities' customers. There is no support whatsoever in the record for the assumption that the utilities will permit this to happen. As this Court held in *United Mine Workers of America* v. *Illinois State Bar Association,* 389 U.S. 217, 223 (1967), speculative and theoretical possibilities of harm do not justify incursions on First Amendment rights.

"Elimination Of Free Ride And Forced Subsidy."

We disagree with the Commission's contention that the bill insert ban is necessary to prevent the utilities from

getting a "free ride" or a "forced subsidy" from their customers for the distribution of their views on controversial issues of public importance. We have stated our position at pages 20-21 of our initial brief and will discuss here only those matters raised in the Commission's brief which we have not heretofore specifically covered.

The cases cited in the Commission's brief (p. 26) do not support its contention. In *Abood* v. *Detroit Board of Education,* 431 U.S. 209 (1977), the Court held that public school teachers could not be compelled by a state-authorized agency shop agreement to pay *additional* union dues to finance certain union political activities with which they disagreed. In *Railway Employees' Department* v. *Hanson,* 351 U.S. 225 (1956), the Court upheld a union shop agreement authorized by the Railway Labor Act under which employees were compelled to pay assessments to cover the costs of collective bargaining. In *Elrod* v. *Burns,* 427 U.S. 347 (1976), the Court held that the dismissal of public employees upon the sole ground of their political beliefs violated their First Amendment rights. In *Buckley* v. *Valeo,* 424 U.S. 1 (1976), the Court sustained a check-off system for taxpayer authorization of appropriations to a presidential election campaign fund which involved no cost to the participating taxpayers. None of these cases stands for the proposition that the use by utilities of their own facilities for the exercise of protected expression, at no cost to their customers, creates a forced subsidy the elimination of which is a compelling governmental interest sufficient to justify the government's prohibition of such use of such facilities.

The Commission's reliance on *Abood* is particularly misplaced. Even though in that case the use of the employees' dues by the union for political purposes resulted in the imposition of higher dues than the employees would other-

wise have paid, the Court indicated that it would be inappropriate to enjoin the union from engaging in political activities, but it might be appropriate for the union to provide an internal remedy by making a pro rata refund of a portion of the dues to those employees who registered their dissent to the use of their dues for political purposes (431 U.S. at 238, 240, 242). Thus, in the case at bar where the inclusion of the bill inserts in the billing envelopes will not cause the utility ratepayers to pay more for their utility service than they otherwise would have paid, it is our view that it is impermissible under the First Amendment to prohibit the utilities from distributing the bill inserts and there is no reason to consider a monetary refund.

The Commission concedes in its brief that "the ratepayer's bill will not be higher if management includes a political bill insert" (Br. at 26). The Commission insists, however, that the utility will receive the benefit of a "subsidized free ride," *id.*, and that this is a sufficient basis to override the utility's First Amendment rights. In effect the Commission contends that it can constitutionally prohibit a utility from expressing its views to its customers in a way that will enable it to save money even though there is no additional expense to its customers; and conversely, if a utility wishes to communicate with its customers on public issues related to its business and to their mutual interests, it can do so only by incurring unnecessary additional costs even though in so doing there is no cost reduction to its customers.

We find no court decision that even suggests that this punitive and uneconomic concept, totally unrelated to the interests of consumer protection which it purports to serve, can be considered as a paramount and compelling governmental interest sufficient to justify an infringement of First

Amendment rights. Furthermore, the Commission refuses to face up to the fact that its ban extends to the use by utilities of all bill inserts to express their views on controversial issues "even when the stockholder pays for it in full" (J.S. App. 43a). Thus, the Commission's argument about a subsidy or free ride is plainly an afterthought because the ban as issued and as it now stands would apply even if the subsidy or free ride were completely eliminated by the absorption of all mailing costs by the utilities' shareholders.

At the end of its discussion of the forced subsidy issue, the Commission advances yet another argument in its attempt to justify the ban, *i.e.*, that the ban is needed to prevent utility managements from gaining an "undue advantage" in violation of the antidiscrimination provisions (Section 65(3)) of the New York Public Service Law (Br. at 31). These provisions are intended to prevent undue discrimination by utilities *among* their customers. *City Ice and Fuel Co.* v. *Public Service Commission*, 260 A.D. 537, 542 (3d Dep't 1940), *motion for leave to appeal denied*, 261 A.D. 847 (3d Dep't 1941). Special Term of Supreme Court held as a matter of state law that these statutory provisions are inapplicable to this case (J.S. App. 27a). Neither the Appellate Division nor the Court of Appeals cast any doubt on the correctness of this holding. (See concurrence in minority opinion of Appellate Division at J.S. App. 22a). Thus, the state law relied upon cannot be considered as creating a governmental interest that would justify upholding the bill insert ban.

Moreover, there is simply no basis in this record for the Commission's conclusion that "use of bill inserts by [utility] management confers an 'undue advantage'" (Br. at 31). In any event, even if the use of bill inserts does give utilities an advantage, the Commission may not constitu-

tionally deprive utilities of that advantage. This Court has made clear that government has no such power. In *Buckley* v. *Valeo, supra,* 424 U.S. at 48-49, the Court said:

> the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'" and "'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"

"Avoidance Of A Public Forum."

Finally, the Commission seeks to justify its bill insert ban by its conclusion that if the utilities are allowed to use bill inserts to express their views on public issues, the billing process will be turned into a public forum that must be opened to other points of view on an equal footing. The Commission fears that it would be difficult to administer fairly such an open access policy (Br. at 32-34).[2]

We disagree with the premise. Under *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974), it would be violative of a utility's First Amendment rights for the Commission or any other governmental agency to compel a utility to print and distribute a bill insert expressing views of others with which it does not agree.

The Commission cannot justify its ban by an argument that it is an alternative to some other unconstitutional scheme which is more difficult to administer.

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[2] A claim of access to Con Edison's billing process was made to the Commission by certain parties in 1976 for the purpose of responding to a bill insert sent out by Con Edison on the subject of nuclear power (A. 23-33). The Commission rejected this claim (A. 49-51), and no appeal was taken by any party. The direct issue of equal access is thus not before this Court on this appeal.

The Commission's reliance on *East Meadow Community Concerts Association* v. *Board of Education,* 18 N.Y.2d 129 (1966), and *Bonner-Lyons* v. *School Committee of Boston,* 480 F.2d 442 (1st Cir. 1973) is misplaced. Both of these cases involved nondiscriminatory access to *government-owned* facilities for expressive activities.

In summary, it is our conclusion that the Commission did not apply the proper standard to any of the justifications it suggests for the bill insert ban. It appears that the Commission adopted a regulatory approach and is satisfied that the ban has a rational basis. This is not enough. In *Thomas* v. *Collins,* 323 U.S. 516 (1945), this Court held that a rational basis will not suffice to justify a restriction on the liberties guaranteed by the First Amendment. The Court said that those liberties have a preferred place in our democratic freedoms and enjoy "a sanctity and a sanction not permitting dubious intrusions" (*id.* at 530). The Court continued (*id.*):

> For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. . . . Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.

The Commission's arguments fall far short of this demanding test.

III

The Commission's Ban Cannot Be Sustained on the Ground That It Extends Only to One Manner of Communication.

The Commission argues in Point I.B. of its brief that its bill insert ban leaves open ample alternative channels for communication (Br. at 14-17). The record in this case is to the contrary. Some channels of communication may not be available at all. There are very real questions as to whether television and radio stations would accept controversial messages for fear of incurring Fairness Doctrine obligations by broadcasting a controversial message (A. 16). And as we showed at pages 23-25 of our initial brief, the alternative means of communication which are available involve more cost and less autonomy, are less likely to reach persons not deliberately seeking the information, and may be less effective media for communicating the message than bill inserts. Upholding the ban would unquestionably reduce Con Edison's ability to communicate to its customers on "controversial matters of public policy."

IV

The Commission's Ban Is Unconstitutionally Vague.

Our initial brief contains our argument on this issue (at pages 26-27). We add here our comments on the Commission's argument (Br. at 34-36).

The two cases cited by the Commission do not sustain its position. *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969), involved a review of the rules and regulations of the Federal Communications Commission pertaining to the fair coverage of public issues by broadcasting stations. The content of these regulations had been defined in a long series of FCC rulings in particular cases (*id.* at 369) and were the subject of thirty years "of consistent administrative construction" (*id.* at 382). This Court, in holding that the regulations were valid, stated that "Past adjudications by the FCC give added precision to the regulations" (*id.* at 395). No such precision is available here.

In *Abood, supra,* involving the pro rata refund to union members of additional service charges for political activities with which they did not agree, the union adopted a voluntary plan for the administration of the refund program. This Court did not pass on the plan (431 U.S. at 242 n.45), and did not decide any question of unconstitutional vagueness.

The Commission is also mistaken in its assertion that Account 426.4 of its Uniform System of Accounts will provide guidance sufficient to overcome the vagueness of its bill insert ban (Br. at 34). There is nothing in the record to support this contention. The Commission points to no interpretations of Account 426.4, and it is apparent that this account is as vague as the Commission's ban.

CONCLUSION

For the reasons stated herein and in our initial brief, the judgment of the Court of Appeals should be reversed and the case remanded with directions that the judgment of the Supreme Court, Albany County, be reinstated.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE

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ON APPEAL FROM THE COURT OF APPEALS
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BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE

Edison Electric Institute ("EEI") hereby submits its brief *amicus curiae* in support of appellant Consolidated Edison Company of New York, Inc. ("Consolidated Edison") in the captioned appeal from a judgment of the Court of Appeals of the State of New York entered in this case on May 1, 1979. In accordance with this Court's Rule 42, Edison Electric Institute has received the written consent of counsel for both parties to file this brief *amicus curiae*. Copies of the consents have been filed with the Clerk.

Interest of Edison Electric Institute

Edison Electric Institute is the principal national association of electric utility companies. Its members serve 99.1 percent of all customers of the investor-owned segment of

the utility industry and supply 77.1 percent of the nation's electricity. The decision of the Court of Appeals of the State of New York from which this appeal is taken concerns a vital interest of EEI and its members—their unhindered freedom to communicate their views on controversial issues of public policy.

As questions of energy supply and distribution have moved to the forefront of national attention, the freedom of utilities to participate in the resulting public debate has gained in significance. By virtue of its need to remain competitive in the field of energy supplies, the utility industry is possessed of accurate and informed data on many issues of vital concern to our society. Such issues include the use of alternate power plant fuels to decrease dependency on foreign oil imports, the effect of environmental costs on utility rates, and the need for development of alternative energy sources, including solar and geothermal power. Confusion and indecision are rampant in these areas as the nation struggles toward the formation of a coherent energy policy. The free flow of information and ideas on such vital issues has become essential for the effective functioning of our democratic process. Any attempt to impair the interchange of ideas on these subjects is detrimental, not only to EEI's utility members throughout the country, but to society as a whole.

ARGUMENT

I

The Public Service Commission's order prohibiting utilities from communicating their views to their customers on "controversial issues of public policy" by means of bill inserts is invalid as a denial of freedom of speech under the First Amendment.

A. *The speech sought to be controlled is at the core of First Amendment protection.*

The Public Service Commission's ("Commission") order prohibits discussion of "controversial issues of public policy" in bill inserts. By its very terms, the ban strikes at speech which is "at the heart of the First Amendment's protection." *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 776 (1978). The need for free and open debate on issues of public concern has traditionally been at the core of protected speech.* This Court has repeatedly emphasized the importance of speech such as that involved in this ban, voicing a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964); *Buckley* v. *Valeo*, 424 U.S. 1, 14 (1975).

By restricting the communication of views on controversial issues, the Commission's ban unduly restrains free ex-

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* Although the Court of Appeals did not characterize the type of speech involved in the ban, the Commission erroneously suggested below that the bill inserts constituted "advertising" (A. at 41a-43a) and were, therefore, entitled to somewhat lesser protection than traditional categories of free speech under *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). See, e.g., Brief for Respondent Public Service Commission of the State of New York on Appeal to the Court of Appeals of the State of New York, pp. 10-16.

pression by the electric utilities. "Effective advocacy of both public and private points of view, *particularly controversial ones,*" has been recognized by this Court as essential to the protection of First Amendment rights. *NAACP* v. *Alabama,* 357 U.S. 449, 460 (1958) (emphasis added). By limiting the permissible subject matter of bill inserts to "non-controversial," "useful" topics (A. at 43a)*, the Commission has improperly and severely limited the ability of the utilities to communicate both information and their own views on issues of importance to them and to the general public. This restriction is contrary to this Court's holding that:

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.... Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama,* 310 U.S. 88, 101-102 (1940), quoted in *First National Bank of Boston, supra,* at 776.

By proscribing the use of bill inserts "as a mechanism for the dissemination of the *utility's position* on controversial matters of public policy" (A. at 58a, emphasis added), the Commission has imposed restraints on the expression of one point of view in all areas of public controversy. This prohibition impairs the "unfettered interchange of ideas" which this Court has found essential "for the bringing about of political and social changes desired by the people."

* All references to appendices refer to the Appendix to the Jurisdictional Statement filed by Consolidated Edison on July 27, 1979.

Roth v. *United States,* 354 U.S. 476, 484 (1957), *Buckley, supra,* at 14.

It is now settled that the fact that a corporation is the source of speech does not diminish or alter the character of the protection afforded by the First and Fourteenth Amendments. *First National City Bank of Boston, supra,* at 777. Electric utilities are no different from other corporations in this respect. Nor is the mere fact that the electric utilities are a regulated industry a justification for restricting their right to be heard on issues of vital importance to society. Even in the area of commercial advertising, this Court has recognized the right of speakers under extensive regulation to First Amendment protection. *Virginia Pharmacy, supra; Carey* v. *Population Services Int.,* 431 U.S. 678 (1977); *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977).* The protection afforded to regulated industry in the area of speech on controversial issues of public policy should be no less. This is particularly so where, as in the case at bar, we are concerned with a state regulation of speech which is not only traditionally strongly protected, but where the regulation goes directly to the content of the prohibited speech.

B. *The Commission's ban is a content-based restriction impermissible under the First and Fourteenth Amendments.*

The essence of the First Amendment was expressed by Mr. Justice Marshall when he wrote that "above all else, the First Amendment means that government has no power

* In the recent commercial speech case of *Friedman* v. *Rogers,* 440 U.S. 1 (1979), this Court permitted state regulation of the use of trade names by optometrists only after finding that trade names are "a form of commercial speech that has no intrinsic meaning" and that the restriction had "only the most incidental effect on the content" of the regulated speech. *Id.* at 12, 16.

to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago* v. *Mosley,* 408 U.S. 92, 95 (1972). Although appropriate "time, place and manner" restrictions have been recognized as valid, *Kovacs* v. *Cooper,* 336 U.S. 77 (1949), such restrictions, to be valid, must be content-neutral, be supported by a significant government interest, and not foreclose alternative channels of expression.* *Virginia Board of Pharmacy, supra,* at 771.

The regulations enacted by the Commission are not content-neutral. The ban goes directly to the subjects which may be discussed in the bill inserts. The Commission has sought to preserve the medium of bill inserts for those communications which it deems to be "useful" for the public to hear while banning discussion of controversial issues.

Government regulation designed to suppress traditional communicative activity, such as the speech here at issue, because of its content or potential impact is subject to the most rigorous scrutiny. Absent some compelling justification, such as a likelihood that speech will incite "imminent lawless action," content-oriented restrictions may not stand. *Brandenburg* v. *Ohio,* 395 U.S. 444, 447 (1969); see *Hess* v. *Indiana,* 414 U.S. 105 (1973); *United States* v. *O'Brien,* 391 U.S. 367 (1968). The Commission, here, has not shown any actual or impending public danger which would justify a ban on discussion of all "controversial issues" by utilities in their bill inserts. It has, instead, merely voiced its

* The utilities have no equivalent alternative means of communication. The medium of bill inserts is a relatively inexpensive mode of communication. It is in the interests of the regulated industry as well as of the public, as ratepayers, for the utilities to use the most economical form of expression available. If access to such an effective, cost-efficient forum is prohibited, the electric utilities will be severely restricted in their ability to express their views and to provide the public with data relevant to important public issues.

opinion that such discussion is not "useful" to the consumer. Such an infringement on the First Amendment rights of the utilities should not be allowed to stand.

Furthermore, the Commission's attempt to categorize the content of proposed speech as "useful" or "not useful" for the consumer to receive in bill inserts is an invalid exercise of regulatory power in violation of the First Amendment. As this Court has determined, regulators may not be permitted "to vindicate [their] own idiosyncratic conception of the public interest." *Red Lion Broadcasting Co.* v. *Federal Communications Comm.,* 395 U.S. 367, 395 (1969). The individual in our society must have the discretion to determine what information is "useful" to him. The Commission may not substitute its own judgment in these matters for that of the public. *Martin* v. *Struthers,* 319 U.S. 141 (1943). In *Martin,* this Court invalidated an ordinance banning door-to-door distribution of literature because the ordinance substituted the judgment of the community for that of the individual. It is for the individual, not the regulator, to determine those views which are worthy of his attention. An attempt by the state to control the content of speech according to its purported usefulness is an invalid infringement on the fundamental right to freedom of speech.

C. *No compelling state interest sufficient to justify the Commission's ban has been demonstrated.*

At various stages of the proceeding in this case, different rationales have been advanced by the Commission and the courts to justify the Commission's ban. None of these rationales includes anything approaching a compelling government interest which can withstand the "exacting scrutiny" mandated by this Court where protected speech is concerned. *Elrod* v. *Burns,* 427 U.S. 347, 362 (1976); *First National City Bank, supra,* at 786.

In upholding the Commission's order, the Court of Appeals of the State of New York found a government interest in the protection of the privacy of recipients of the bill inserts. It relied primarily on this Court's opinion in *Rowan* v. *United States Post Office Department,* 397 U.S. 728 (1970). Upon consideration, however, it is obvious that the decision in *Rowan* is completely inapposite to the case at bar. *Rowan* involved the constitutionality of a statute pursuant to which the Postmaster General might order the sender of unsolicited "pandering" material to stop sending it if the recipient of such material so requested. In the case at bar, not only does the ban operate to prohibit communications which are not patently offensive, but it does so upon its own initiative without requiring any action by the intended recipients.

The privacy interests invoked by the Court of Appeals are not in fact threatened in any meaningful way. Expression of views on "controversial issues of public policy" is not inherently offensive, nor is the form of communication unduly intrusive. There is no "captive audience" involved here as there was in *Lehman* v. *City of Shaker Heights,* 418 U.S. 298 (1974).* The recipient of bill inserts is entirely free to discard them unread. Indeed, the mailbox

> "is hardly the kind of enclave that requires constitutional defense to protect the privacies of life. The short, though regular, journey from mailbox to trash can . . . is an acceptable burden." *Lamont* v. *Commissioner of Motor Vehicles,* 269 F.Supp. 880, 883 (S.D.N.Y. 1967).

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* Mr. Justice Douglas, who first gave the "captive audience" doctrine judicial recognition, noted that coercion is a necessary element of the doctrine. He captured the essence of this concept in *Public Utilities Commission* v. *Pollak,* 343 U.S. 451 (1952), writing:

> "The present case involves a form of coercion to make people listen . . . [T]he man on the streetcar has no choice but to sit and listen, or perhaps to sit and try *not* to listen." *Id.* at 468-69 (Douglas, J., dissenting opinion). (emphasis in original).

In the present case, the recipient of a bill insert is no more compelled to sit and read it than is the recipient of any piece of mail containing views with which he does not agree or in which he is not interested.

This Court has protected the rights of door-to-door solicitors against similar attacks. *Hynes* v. *Mayor of Oradell,* 425 U.S. 610 (1976); *Martin* v. *Struthers,* 319 U.S. 141 (1943). In *Martin,* Mr. Justice Black, writing for the Court, noted:

> "Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas." 319 U.S. at 146-147.

Certainly, the mailing of bill inserts is less inherently intrusive than the physical presence of a canvasser in the doorway. And the effort required to be made by the recipient of the insert in discarding it unread is certainly no more burdensome than the effort involved in turning a canvasser away unheard. Indeed, it is the right as well as the responsibility of the individual in our society to make such decisions.

The Commission's ban is, therefore, invalid as an attempt to protect the privacy of those who may find the bill inserts objectionable. The government's interest in the recipients' privacy is not sufficiently compelling to justify

such a ban. In the absence of such interest the restriction fails to survive the standard of scrutiny required by the First and Fourteenth Amendments.

Furthermore, speculation that some recipients may find the proscribed contents of the bill inserts offensive, as the Court of Appeals has asserted (A. at 10a), is no justification for the imposition of a government ban. This Court has repeatedly affirmed the pre-eminence of speakers over unwilling listeners in the absence of coercion. *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205 (1975); *Cohen* v. *California,* 403 U.S. 15 (1971); *Street* v. *New York,* 394 U.S. 576 (1969). In *Street,* Mr. Justice Harlan, writing for the Court, noted:

> "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Id.* at 592.

This Court has expressed concern about the ability of government agencies to make adequate determinations as to what is or is not offensive. As Mr. Justice Harlan, in *Cohen, supra,* wrote:

> "Indeed, we think it is largely because government officials cannot make principled distinctions in this area [between offensive and non-offensive words] that the Constitution leaves matters of taste and style so largely to the individual." *Id.* at 25.

In the past this Court has refused to allow government control of the mails based on a regulator's concept of what matters would be "offensive" to the recipient. As this Court wrote in *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965), "the use of the mails is almost as much a part of free speech as the right to use our tongues . . ." *Id.* at

305. See also, *Blount* v. *Rizzi,* 400 U.S. 410 (1971) which invalidated an attempt to vest in the Postmaster General power similar to that accorded individual addressees in *Rowan, supra.*

In *Lamont* v. *Postmaster General, supra,* this Court invalidated a postal regulation which required the addressee of "communist propaganda" to affirmatively request its delivery. The ostensible purpose of the regulation was to shield addressees from unwarranted "offensive" mail. The Commission's total ban on discussion of controversial topics in bill inserts appears to be even more objectionable than the partial restraint struck down in *Lamont.* In the case at bar, even those customers who wish to receive information concerning the utilities' informed opinions on controversial issues will be prevented from doing so.

There is no valid government interest in shielding consumers from exposure to ideas the Commission arbitrarily determines may be offensive to some of them. Insofar as the Commission's ban is based on an attempt to do so, it is an unconstitutional infringement on speech protected by the First Amendment.

Other possible interests advanced by the Commission to justify such a severe restriction on freedom of speech will not withstand "exacting scrutiny." The use of bill inserts does not involve a "forced subsidy" (A. at 67a) such as that at issue in *Abood* v. *District Board of Education,* 431 U.S. 209 (1977). In *Abood,* dissenting union members were forced to make tangible out-of-pocket contributions to candidates whom they opposed. In the present case, the dissemination of the utilities' message through bill inserts imposes no additional costs whatever on ratepayers who may or may not disagree with the utilities' position.

Nor are bill inserts a scarce medium analogous to physically limited radio and television bands. (A. at 66a). They are, if anything, an economically limited resource analogous to newspapers. This Court has refused to permit the regulation of newspapers in the public interest merely because economic considerations limit the number of newspapers published. *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974). Even when dealing with electronic media, the most closely regulated mode of speech in our society, the Federal Communications Commission ("FCC") has never sought to decide what was most "useful" for listeners to hear. See, *e.g., Columbia Broadcasting System* v. *Democratic National Committee,* 412 U.S. 94 (1973). Surely, the Commission cannot claim greater power to control the content of the utilities' speech than that asserted by the FCC over the electronic media.

The Commission has also alleged that the use of bill inserts provides the utilities with an unfair advantage in disseminating their views. (A. at 64a-65a) In effect, the Commission has sought to "equalize" speech by prohibiting one speaker from utilizing a given method of communication. However, this Court in *Buckley, supra,* emphatically rejected the notion that speech imbalance may be redressed by imposing direct restraints on communication.

> "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. *Id.* at 48-49.

Thus, to the extent that the Commission seeks to uphold the direct restraint upon the utilities' speech to prevent an "unfair advantage" in the dissemination of information and opinions, it is in clear violation of the First Amendment.

I I

The Commission's ban of bill inserts discussing "controversial issues of public policy" while encouraging inserts providing "non-controversial" and "useful" information is unconstitutionally vague.

This Court has consistently held that whenever the state seeks to regulate speech, it must act with a high degree of specificity. *First National Bank of Boston, supra,* at 785, n. 21. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button,* 371 U.S. 415, 438 (1963). An enactment is void for vagueness under the principles of due process if its prohibitions are not clearly defined. *Grayned* v. *City of Rockford,* 408 U.S. 104, 108 (1972); *Hynes* v. *Mayor of Oradell, supra,* at 620-21; *Buckley, supra,* at 40-41. The existence of a vague prohibition on communicative activity chills expression which persons fear may fall within the prohibition and is, therefore, invalid. "When one must guess what conduct or utterance may lose him his position, one necessarily will steer far wider of the unlawful zone." *Keyishan* v. *Board of Regents,* 385 U.S. 589, 604 (1967); *Speiser* v. *Randall,* 357 U.S. 513, 526 (1958). See also, *Baggett* v. *Bullitt,* 377 U.S. 360 (1964); *Cramp* v. *Board of Public Instruction,* 368 U.S. 278 (1961).

Vague regulations turn the official charged with enforcing them into a discretionary censor. Such overbroad discretion may empower the Commission "to silence dissidents simply as a matter of personal predilections." *Cohen, supra,* at 21. See also, *Smith* v. *Goguen,* 415 U.S. 566, 575-576, (1974). As Chief Justice Burger, writing for the Court in *Hynes, supra,* noted:

> "Nor does the ordinance provide explicit standards for those who apply it. To the extent that these am-

> biguities . . . give police the *effective* power to grant or deny permission to canvas for political causes, the ordinance suffers in its practical effect from the vice condemned in *Lovell, Schneider, Cantwell,* and *Staub.* See also *Papachristou* v. *City of Jacksonville,* 405 U.S. 156, 162 (1972); *Coates* v. *Cincinnati,* 402 U.S. 611 614 (1971)." 425 U.S. at 622 (emphasis in the original).

In the instant case, the ban is so vague as to prevent the utilities from being certain as to what the Commission considers prohibited. In addition, by its order, the Commission has vested in itself the absolute power to determine what is "useful" and "non-controversial."

The uncertainty inherent in the regulation is evidenced by the Commission's admission that it may be necessary for it to render advance opinions as to what it will permit to appear in the inserts. (A. at 68a). The Commission's willingness to provide such case-by-case determinations in no way affects the essential vagueness and uncertainty caused by its order. The need for such individualized decisions merely illustrates the fact that the Commission itself has been unable to articulate a clear and explicit standard. In fact, members of the Commission itself have not always agreed on what should constitute "useful" information. While the majority specifically excluded from this category "materials . . . concerning the development of nuclear power," (A. at 43a), then Chairman Alfred E. Kahn stated that he "would be inclined to agree" with utility managements that it is in the public interest for them to continue "to present their views on the merits of nuclear energy." (A. at 55a). Mr. Kahn would have preferred that such communications be treated as a sub-topic of "institutional advertising."

Putting the power in the hands of the Commission to issue continuing subjective and arbitrary interpretations of an inherently vague regulation is a violation of the due process clause. Such standardless discretion, even if exercised in good faith, must render the regulations unconstitutional under the First and Fourteenth Amendments.

CONCLUSION

The Commission's ban on discussion of "controversial issues of public policy" in utility bill inserts is an unconstitutional infringement on the utilities' freedom of speech. The ban is content-based, striking at speech on controversial issues—speech which is at the very heart of First Amendment protection. No valid government interest is served by this ban which is so inherently vague as to be void under the First and Fourteenth Amendments. Therefore, the Commission's attempt to impair the fundamental freedom of the utilities to speak is unconstitutional and should not be condoned by this Court.

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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF OF THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, INC. AS AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

The American Association of Advertising Agencies, Inc. ("A.A.A.A."), with consent of all parties, files this brief as *amicus curiae* urging that the judgment of the Court of Appeals of the State of New York be reversed. The decision of the Court of Appeals is of substantial concern to the A.A.A.A. because it upholds an unjustified suppression of constitutionally protected information of value to the public.

The A.A.A.A. is the national association of the advertising agency business. Its members include more than 480 advertising agencies, located throughout the United States, which handle approximately three-fourths of all national advertising placed by advertising agencies, as well as a substantial amount of local retail and public interest advertising.

Advertising agencies are experts in communicating with the public at large. They design advertising campaigns and create, execute and place advertisements on behalf of their clients, who for the most part are businesses, including utilities, engaged in selling goods and services to the public. A substantial number of them are also interested in otherwise informing a wide audience of facts and opinions relevant to current public affairs.

Public utilities across the nation have recently turned to advertising as the best—and perhaps the only—way to obtain a broad forum within which to communicate particular facts and opinions of significance to current issues. However, utilities are not alone in their reliance on public interest advertising: corporations of all kinds increasingly use advertising to describe their functions and activities, to defend themselves against accusations of environmental, economic or other wrongdoing, and to state their views on energy, conservation and other matters of public importance.[1] Indeed, a recent survey indicates that approximately 16 percent of the major United States corporations have undertaken advertising intended to "inform, educate or advocate relative to public issues." *New York Times,* October 18, 1979, at D15.

Whether the advertising promotes goods and services or conveys facts and opinions outside the realm of commerce, it is the agency's job to devise a message that effectively and memorably presents salient information and ideas on behalf of a client, to fashion advertisements that will capture and focus attention on the message, and to place the advertisements in media that will efficiently reach

1. Public interest advertising may also provide additional benefits for corporate advertisers, for it fosters an increased understanding of the advertiser's positions on the part of employees and potential investors.

the desired audiences. Mass audiences are, after all, comprised of many overlapping audiences, segmented by geography, age, sex, education, job, income, marital status, race, language, national origin, religion, politics, leisure activities, and cultural interests. Different kinds of media reach different audiences, or reach the same audience with different efficiency or different impact. Restricting use of a particular medium for certain types of messages might effectively deny non-commercial communication by businesses to some audiences and would assuredly impair the efficiency and vitality of communication of that type of message with many others.

The bill inserts at issue in this case may reach some audiences that other media reach barely or not at all, may reach other audiences with greater efficiency than other media, and may be particularly suited to certain kinds of campaigns or certain kinds of clients. Restricting use of this important technique, even though the ban is directed against only certain users and certain types of messages, will inevitably impair the ability of A.A.A.A. members to communicate with significant audiences on behalf of their clients. If the ban at issue in this appeal spreads to other major states and other types of users, the impact on all A.A.A.A. members would be severe.

The A.A.A.A. opposes a ban on any particular channel of public communication. The constitutional right of free expression is a powerful component of our nation's liberties. It should not lightly be restricted, even in seemingly minor ways.

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight

> deviations from legal modes of procedure. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Boyd v. *United States,* 116 U.S. 616, 635 (1886). The death of one technique for expression in one place, judicially sanctioned, could pave the way for assaults on other media in many places.

QUESTION PRESENTED

This brief will address the question whether an order of the New York State Public Service Commission which prohibits New York utilities from communicating their views on "controversial matters of public policy" by means of bill inserts to their customers can stand or must be stricken as a denial of rights protected by the First Amendment.

SUMMARY OF ARGUMENT

The argument to be presented consists of two parts:

(1) The communications prohibited by the Order of the Public Service Commission—utility customer bill inserts containing expressions on "controversial matters of public policy"—are entitled to the full constitutional protection afforded by the First Amendment.

(2) The interests asserted by the Public Service Commission are insufficient to justify the insert ban's suppression of protected expression.

I.

THE UTILITY BILL INSERTS PROHIBITED BY THE PUBLIC SERVICE COMMISSION ARE ENTITLED TO FULL CONSTITUTIONAL PROTECTION.

Bill inserts of the type banned by the Public Service Commission are an advertising medium. They convey messages, often prepared by an advertising agency, from an advertiser to the public. For the most part, bill inserts are "commercial" in nature, informing consumers of the quality and availability of goods and services. However, an increasing number of bill inserts contain messages which are non-commercial, and it is non-commercial messages on controversial issues of public policy by Consolidated Edison Company which are banned by the Public Service Commission's proscription. When the Commission's Order is examined in light of established principles of constitutional law, there can be no doubt that the ban curtails protected free expression.

At the heart of the First Amendment is the fundamental relationship between the free flow of information and a self-governing people. Our democracy is grounded upon the conviction that wise policies are most likely to prevail in public affairs when a broad range of ideas and opinions are disseminated for consideration by the citizenry. This Court has declared that "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana,* 379 U.S. 64, 74-75 (1964), *quoted in First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 777 n.12 (1978). Thus, "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs," *Mills* v. *Alabama,* 384 U.S. 214, 218 (1966), and the mandate of the Amendment is that

governmental bodies may not proscribe the form or content of individual expression. *Police Department of Chicago* v. *Mosley,* 408 U.S. 92, 95 (1972).

However, communication does not take place without a receiver as well as a sender. The right of all to speak freely implies an equal right on the part of the public to hear those who would speak. The freedom to learn, to be fully informed on matters of interest, is as precious an inheritance as the freedom to tell. Therefore, the guarantees of the First Amendment reach beyond the individual speaker to encompass, as well, the recipient of the communication. As this Court summarized recently in a case which invalidated as unconstitutional a Virginia statute prohibiting the advertising of prices of prescription drugs, "[i]f there is a right to advertise, there is a reciprocal right to receive the advertising." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 757 (1976). *See Red Lion Broadcasting Company* v. *FCC,* 395 U.S. 367, 390 (1969); *Stanley* v. *Georgia,* 394 U.S. 557, 564 (1969); *Martin* v. *Struthers,* 319 U.S. 141, 149 (1943).

While the persuasive aspect of commercial advertising may be of particular value to sellers of goods or services, the informational content may nonetheless be significant to consumers, whose knowledge of product availability would be restricted in the absence of advertising. Of possibly greater significance to consumers and citizens, however, is advertising relating to issues of public importance, for which intelligent and well-informed judgments are needed. The public's understanding varies with the quantity and quality of its information. This Court's decisions involving corporations which have undertaken to communicate with a segment of the public are appropriately based:

> not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas.

First National Bank of Boston v. *Bellotti,* 435 U.S. 765, 783 (1978) (footnote omitted) (citing cases). Suppression of advertising directed to issues of public significance cannot be achieved without suppressing informational content, thereby impermissibly curtailing the consumer/citizen's right to know.

Any contention that corporate advertising relating to issues of public policy is not a protected form of speech has been entirely swept away in recent years by a series of decisions of this Court. *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765 (1978); *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977); *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. 85 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976); *Bigelow* v. *Virginia,* 421 U.S. 809 (1975). It is now well settled that the inherent informational value of speech does not depend upon the identity of its source, be it corporation, association, individual, or public utility. *Id.*

Moreover, the fact that Consolidated Edison Company is subject to the regulatory authority of the Public Service Commission cannot diminish the protections of the First Amendment. For example, the pharmacists in the *Virginia Pharmacy* case were licensed by the state and subject to what this Court characterized as "extensive regulation," 425 U.S. at 750-51, yet a statutory restriction on their right to advertise was nonetheless struck down because it violated protected expression. Similarly, in the *Bel-*

lotti case, a state statute forbidding expenditures by corporations, including regulated utilities, to influence votes on policy referenda was invalidated because it abridged expression that the First Amendment was meant to protect. 435 U.S. at 776. The statute was not saved by the fact that utilities happen to be regulated in areas unrelated to free expression.

Nor does the possibility that some recipients of a utility bill insert might find its message controversial or even moderately offensive divest it of constitutional protection. To the contrary:

> It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.

Street v. *New York,* 394 U.S. 576, 592 (1969). Indeed, if a speaker's opinion might give offense or stir controversy, there is an even greater need to shelter the expression in order to protect and promote diversity, intellectual stimulation, and challenges to prejudice and preconceived notions. *See First National Bank of Boston* v. *Bellotti,* 435 U.S. at 777 n.12 & 781-82; *Cohen* v. *California,* 403 U.S. 5, 23-26 (1971); *Terminiello* v. *Chicago,* 337 U.S. 1, 4 (1949).

Furthermore, First Amendment protections are not limited to traditional forms of the spoken or printed word, but extend as well to "constantly proliferating new and ingenious forms of expression." *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 210 (1975). Freedom of speech is not simply a matter of the right to distribute pamphlets printed on a hand press after working hours. New methods of advertising have become essential to public expression of a wide spectrum of ideas and opinions by

both business and private citizens. The Constitution necessarily encompasses practicable means of conveying facts and ideas to an audience of thousands, even millions. *Id.: Lovell* v. *Griffin,* 303 U.S. 444, 452 (1938).

The bill inserts proscribed by the Public Service Commission are an important means of gaining access to a mass audience. As such, they are unquestionably a valuable technique for the dissemination of information and opinion to the public. Without doubt, they are entitled to the full protections of the First Amendment.

II.

THE INTERESTS ASSERTED BY THE PUBLIC SERVICE COMMISSION ARE INSUFFICIENT TO JUSTIFY THE SUPPRESSION OF SPEECH RESULTING FROM THE BAN.

The constitutionality of the Public Service Commission's ban of bill inserts relating to public policy issues rests upon whether the justifications offered in its support can survive "the critical scrutiny demanded under accepted First Amendment . . . principles." *Buckley* v. *Valeo,* 424 U.S. 1, 11 (1976). In an earlier case, while striking a state requirement that public school children salute the flag, the Court suggested a prophetic example:

> The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.

West Virginia State Board of Education v. *Barnette,* 319 U.S. 624, 639 (1943). *Accord, First National Bank of Boston* v. *Bellotti,* 435 U.S. at 786; *Elrod* v. *Burns,* 427 U.S. 347, 362 (1976); *Bates* v. *City of Little Rock,* 361 U.S. 516, 524 (1960). Appropriate scrutiny of the Public Service Commission's Order reveals a lack of sufficient state interests to justify the ban of certain bill inserts. The Court of Appeals of New York erred in finding otherwise.

A. No Asserted State Interest Justifies The Ban's Content-Based Restriction Of Speech.

The applicability of the Public Service Commission's ban obviously turns on the content of the message, for communications concerning "controversial issues of public policy" are prohibited while messages about other topics are not. In concluding otherwise, the Court of Appeals apparently relied on what it characterized as the "objective and evenhanded manner" of the ban. 47 N.Y. 2d 94, 107; 417 N.Y.S. 2d 30, 37 (1979). Apparently, the New York Court of Appeals reasoned that, so long as speech on all sides of a particular type of issue is suppressed equally, there can be no violation of the First Amendment.

However, the argument proves too much: the First Amendment obviously will not tolerate sweeping suppressions of speech merely because the restriction might be applied "evenhandedly" to everyone. It is the suppression itself which does violence to the individual and societal interests in free speech, and an unjustified restriction cannot be salvaged by its "objective" application. *See First National Bank of Boston* v. *Bellotti,* 435 U.S. 765; *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748.

In approving the ban despite its dependence on the content of bill insert messages, the Court of Appeals relied on *Greer* v. *Spock,* 424 U.S. 828 (1976), and *Lehman* v. *City of Shaker Heights,* 418 U.S. 298 (1974).[2] 47 N.Y.2d 94, 107; 417 N.Y.S. 2d 30, 37 (1979). But those cases are not on point. The *Greer* case concerned a prohibition of partisan political speeches on a federal military installation. The *Lehman* case concerned the right of a municipality to refuse space on a city rapid transit system for campaign advertising by a political candidate. In both cases, this Court held that the restrictions did not violate the rights of those seeking to express themselves. In neither case, however, did the restriction discriminate among differing viewpoints within the same subject matter. Here, in contrast, the Public Service Commission has prohibited bill inserts as a mechanism for the dissemination of the *utility's viewpoint* on controversial issues. Moreover, both *Greer* and *Lehman* involved federal or municipal property and resultant concerns about the appearance of governmental entanglement with partisan political activities. In contrast, the insert ban at issue in this case presents no similar factors.

Given that the Commission's ban acts to suppress communications with certain characteristics only when expressed by utilities, the Court of Appeals' assertion of non-discriminatory application sounds hollow indeed.

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2. The Court of Appeals also referred to *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205 (1975), but that case offers no support for—indeed, it contradicts—the reasoning of the Court of Appeals. *Erznoznik* concerned a local ordinance which punished, as a public nuisance, any film exhibition of nudity by drive-in theaters if the screens were visible from a public street. This Court held the ordinance invalid on its face as a violation of free speech precisely *because* it censored movies solely on the basis of their content without sufficient justification.

B. No Asserted State Interest Justifies The Ban As A Mere Time, Place Or Manner Restriction.

The bill inserts which give rise to this case are an important means of corporate communication for several reasons. First, as a vivid and direct form of communication, they can attract the attention of responsible individuals capable of benefitting from serious information about complicated subjects. Second, they are effective in reaching their intended audience, utility customers. Third, their per recipient cost is very low given that they can be simply included in a billing package that is to be mailed in any event.

1. The State's Interest In Protecting The Sensibilities Of Utility Customers Cannot Justify The Ban.

The record in this case, containing a mere handful of complaints from among millions of utility customers about bill insert materials, *see* R. 139-50, does not provide a justification for the Public Service Commission's proscription. Moreover, there is no reason in logic to assume that the receipt of bill inserts containing "controversial" statements by utilities is any more "offensive" than the receipt of viewpoints of utilities—or others—by other means.

To the contrary, bill inserts are a relatively unobtrusive means of communication. They involve no disconcerting ringing of the telephone, nor any intrusive door-to-door canvassing. They can be contemplated at a time of the recipient's own choosing, at his or her pace, and in whatever surroundings he or she desires. Significantly, unwanted bill inserts can be easily disposed of after no more than a cursory review. Indeed, the trivial task of disposing of unwanted inserts suggests that in this case, as in *Cohen* v. *California,* 403 U.S. 15, 21 (1971), and *Erznoznik*

v. *City of Jacksonville,* 422 U.S. at 211, the burden should properly fall "upon the [recipient] to 'avoid further bombardment of [his] sensibilities simply by averting [his] eyes.'"

In finding a justification for the ban in an asserted need to protect the sensibilities of utility customers, the Court of Appeals relied on *Rowan* v. *United States Post Office Department,* 397 U.S. 728 (1970), and *Martin* v. *Struthers,* 319 U.S. 141 (1943). Rather than offering support for the Commission's ban, however, those cases emphasize that the decision whether to receive and consider a particular communication is a judgment best left to the homeowner, not the state. In *Rowan,* a statute permitting householders to require mail advertisers to halt delivery of advertisements which the addressee believed to be sexually provocative was upheld against a First Amendment challenge. Unlike the Commission's ban, however, the statute in *Rowan* permitted the potential recipient, not the government, to make the decision to halt the deliveries and did not prevent those wishing to receive the communications from doing so. 397 U.S. at 737. Similarly, this Court in the *Struthers* case invalidated an ordinance banning door-to-door distributions because the law substituted the judgment of the government for that of the affected individual. 319 U.S. at 143-44.

This Court's statement in *Cohen* v. *California* is particularly instructive:

> The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that *substantial privacy interests* are being invaded in an *essentially intolerable manner.* Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

Cohen v. *California,* 403 U.S. at 21 (emphasis added), *quoted in Erznoznik* v. *City of Jacksonville,* 422 U.S. at 209-10. Quite clearly, the Court of Appeals erred in finding that a purported need to protect the sensibilities of utility customers justifies the Commission's ban.

2. The Ban Does Not Allow "Ample Alternative Channels" For Communications By Utilities.

To satisfy the requirements of the First Amendment, governmental restrictions on the time, place and manner of expression must allow "ample alternative channels" for communication of the information being restricted. *Virginia State Board of Pharmacy* v. *Virginia Consumers Council, Inc.,* 425 U.S. at 771, *quoted in Friedman* v. *Rogers,* 440 U.S. 1, 9 (1979), *and Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. 85, 93 (1977). The Commission's ban on bill inserts does not provide "ample alternative channels" for communication of messages on controversial issues of public policy.

It is insufficient for the Commission to argue that its restriction of speech provides for alternative channels for communication simply because the insert ban applies to only one technique for expression. *See Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. at 94; *Grayned* v. *City of Rockford,* 408 U.S. 104, 118-19 n.40 (1972). Indisputably, however, other techniques for communicating the messages of New York utilities will be more expensive than bill inserts, *see* 47 N.Y.2d at 106, 417 N.Y.S.2d at 36, and in all likelihood will be less effective in conveying the total content—emotive, declarative and persuasive—of the messages. The Commission itself characterized the medium of bill inserts as "unique." Statement of Policy on Advertising and Promotional Practices of Public Utilities, Order of the Public Service Commission of the State of New York Denying Petitions for Rehearing, July 14, 1977, 17 N.Y. P.S.C. 17-R, 19-R (1977).

CONCLUSION

In our pluralistic society with its developing forms and means of expression, it is vital to accord a full scope to the constitutional guarantees of the First Amendment. The Public Service Commission's ban restricts the "free flow of truthful information," *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. at 95, by proscribing one particular technique for communicating specific messages of the greatest significance to the public as consumers and citizens. The interests invoked by the Commission to justify such a ban pale when compared to the rights to free expression infringed by the Commission's Order. The decision of the Court of Appeals of New York upholding the Order was therefore improper.

Accordingly, for the reasons set forth above the decision of the Court of Appeals of New York should be reversed.

Respectfully submitted,

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Appellant,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

BRIEF OF
PACIFIC GAS AND ELECTRIC COMPANY,
SAN DIEGO GAS & ELECTRIC COMPANY AND
SOUTHERN CALIFORNIA EDISON COMPANY,
AS AMICI CURIAE

OPINION BELOW

The Opinion of the Court of Appeals of the State of New York is reported at (1979) 47 N.Y.2d 94, 390 N.E.2d 794, 417 N.Y.S.2d 30. The Opinion of the New York Supreme Court, Appellate Division, Third Judicial Department, is reported at (1978) 63 A.D.2d 364, 407 N.Y.S.2d 735. The Opinion of the New York Supreme Court, Albany County, is reported at (1978) 93 Misc.2d 313, 402 N.Y.S.2d 551.

JURISDICTION

The petition noting probable jurisdiction was filed on July 27, 1979, and probable jurisdiction was noted by this Court on October 2, 1979. This Court has jurisdiction under 28 U.S.C. section 1257(2).

CONSENT TO FILING

This Amici Curiae brief is being filed with the consent of all parties to the proceeding.

QUESTION PRESENTED

Whether a state may, consistent with the First Amendment to the United States Constitution, prohibit a utility from inserting "the utility's position on controversial matters of public policy" in its billing envelopes?

INTEREST OF THE AMICI CURIAE

Pacific Gas and Electric Company (PGandE) is one of the world's largest investor-owned combined gas and electric utilities. Incorporated in 1905, PGandE services 48 of California's 58 counties (electric—47, gas—37), operates 12 thermal plants and 64 hydroplants generating in excess of 10 million kw. With over 6 million gas and electric customers, PGandE has a great need to communicate with its customers on numerous matters relating, inter alia, to its ability to serve them in a reliable and efficient manner.

Since December 1923, PGandE has published a monthly newsletter called *PG&E Progress* (*"Progress"*) to communicate with its customers. In its first issue, PGandE stated the purpose of *Progress:*

> The aim of the company has been to win the public good will by deserving the public good will. . . . To this end, the company will never hesitate to "speak up" and tell its story in order that the public it serves may know and understand its purposes, its accomplishments and its policies. The "Progress" is put forth as a natural and logical development of the old and tried

> policies of the company. It will be primarily a journal of fact. It will record the growth of the state and the territory the company serves, the growth of the hydroelectric industry, the development plans of the company—the problems involved in building the Commonwealth of Destiny. It will present the facts involved in financing and operating the great gas and electric industries, and any and all other facts which may prove useful and serviceable to the public.

Today, *Progress,* which is printed at stockholder expense has a total circulation of 3,549,631 and is mailed each month to customers in the billing envelope at no additional cost. The choice of receiving *Progress* is that of each customer —each edition of *Progress* contains language informing the customer of the right not to have *Progress* mailed with the bill.

In 1975 the California Legislature enacted a statute somewhat similar to the New York Public Service Commission's (PSC) order at issue in this case. That statute, which is now section 453(d) of the California Public Utilities Code (section 453(d)), reads as follows:

> No public utility shall include with any bill for services or commodities furnished any customer or subscriber any advertising or literature designed or intended (1) to promote the passage or defeat of a measure appearing on the ballot at any election whether local, statewide, or national, (2) to promote or defeat any candidate for nomination or election to any public office, (3) to promote or defeat the appointment of any person to any administrative or executive position in federal, state or local government, or (4) to promote or defeat any change in federal, state,

or local legislation or regulations; provided that until December 31, 1976, any such prohibitions shall not apply to any notice or statement relating to matters affecting rates or service to customers or subscribers where the public utility has requested and received the prior approval of the commission.

Today, energy continues to be of extremely critical concern not only to California but to the entire nation. Considerable debate has taken place and continues to take place about our energy future. In short, energy has become of such vital concern that it impacts significantly almost every aspect of our economy. Governmental regulations as well as other governmental policies have made supplying energy substantially more complex.

Now, more so than ever before in the history of this country, there is an urgent need for utilities to communicate to customers on every aspect of this critical subject. However, because of section 453(d) PGandE is precluded from printing many of its views in *Progress* on nuclear power and other sources of energy because some of those views may be interpreted as being *designed* or *intended* "to promote or defeat [a] change in federal, state or local legislation or regulations . . ." on energy since *Progress* is mailed with the customer's bill.[1]

The net effect of section 453(d) has been to foreclose PGandE from communicationg with its customers on many matters that are essential to its ability to meet their future

[1]The postage alone for separately mailing *Progress* first class would cost almost $500,000 per month. Rather than incur this huge cost, PGandE has elected not to express its views in *Progress* on many critical energy matters relating to the Company's ability to meet its obligation to supply adequate energy to its customers.

energy needs. Accordingly, PGandE is extremely concerned about the resolution of this current case especially since the decision could probably determine, to a significant extent, its constitutional right to communicate through *Progress* important information to customers on such crucial matters as energy. Moreover, this case raises very basic and essential First Amendment issues which strike at the core of free speech. Affirmance of the New York court's decision, allowing government to control the content of the billing envelope of a private corporation, would strike a severe blow to the concept of free speech.

San Diego Gas & Electric Company (SDG&E) is an investor-owned public utility principally engaged in generating and distributing electricity and in distributing natural gas. Its service territory includes 90 communities located in San Diego County and in adjoining portions of Orange County to the North and a small section of Imperial County to the East. SDG&E currently serves approximately 740,310 electric service customers, approximately 486,564 gas service customers and, in addition, provides steam and cooling services to more than 60 industrial operations either directly or through its wholly owned subsidiaries.

In the past SDG&E has often placed informational material such as an explanation of the bill and safety and conservation measures in the same envelopes in which it has mailed bills to customers, and has recently included a monthly four-page periodical entitled "Lite Lines." "Lite Lines" provides a variety of information to customers regarding the availability of power, the power supply sys-

tem, consumer tips, services offered by the Company to its customers and Company policy directly affecting customers. "Lite Lines" and most of the other materials included in the envelopes with customer bills are paid for by the shareholders of SDG&E, not by its customers.

Because of section 453(d), which is somewhat similar to the PSC order in the instant case, SDG&E's ability to communicate (in "Lite Lines") to its customers on a variety of important policy matters has been severely hampered.

Southern California Edison Company ("SCE") is an investor-owned electric utility serving approximately eight million customers in a 50,000 square mile service territory. As a California utility, regulated by the California Public Utilities Commission, SCE is expressly prohibited by section 453(d) from including materials of a political nature or which may be considered to be intended or designed to influence governmental action in its billing envelopes.

The decision below is a direct violation of a utility's First Amendment right to speak and its customers' First Amendment right to listen. The restraint imposed by the PSC on these important First Amendment freedoms was predicated on the notion that New York may determine when a utility can speak based on PSC's assessment of whether the issue is "controversial."

On the other hand, section 453(d)'s prohibition on a utility's right to communicate with its customers by literature in the billing envelope is also a direct prohibition upon free speech, but it is not so subtle. The statute unilaterally, without reference to the "controversiality" of the subject

matter, forbids a utility from disseminating information on any ballot measures, candidates, or appointments on a local, state, or national level through its billing envelope. California's prohibition on a utility's right to engage in the free trade in ideas is absolute and cannot seriously be considered "closely drawn to avoid unnecessary abridgement. . . ." *Buckley v. Valeo* (1976) 424 U.S. 1, 25. Thus, PGandE, SDG&E and SCE fervently believe that the issues decided in the instant case will have a significant impact on the First Amendment rights of every utility in California.

STATEMENT OF THE CASE

In 1977, the New York Public Service Commission (PSC), in exercising its regulatory and supervisory powers over public utilities licensed to operate in that state, ordered Consolidated Edison Company (Con Edison) to "discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy." (*Consolidated Edison Co. v. PSC, supra,* at p. 33.)

The rationale set forth by PSC for its ban was that: "We believe that using bill inserts to proclaim a utility's viewpoint on controversial issues . . . is tantamount to taking advantage of a captive audience, since the consumer cannot avoid receiving the utility's message." (*Id.* at p. 33.)

Utilizing bill inserts to inform customers of a utility's position on "controversial matters of public policy" is an effective, economical and reasonable method for a utility to communicate with its customers. In holding the bill insert ban unconstitutional, Special Term of the Supreme

Court of New York found that the ban was a restriction on speech not justified by a compelling state interest and rejected PSC's captive audience argument.

The Appellate Division, Third Department, reversed the judgment of Special Term and held PSC's order to be constitutional; and upon appeal by Con Edison to the Court of Appeals of New York, that court upheld the Appellate Division, stating that PSC's ban was not a content-based regulation even though it was directed solely at the content of the message sought to be communicated.

ARGUMENT

I

THE DECISION OF THE COURT BELOW RESULTS IN AN INFRINGEMENT UPON THE CONSTITUTIONALLY PROTECTED FREE SPEECH RIGHTS OF A UTILITY AND ITS CUSTOMERS

A. Prohibiting A Utility From Including Its Views On Controversial Issues Relating To Public Policy In Its Billing Envelope Is A Direct Restraint Upon Free Speech

Under the First Amendment, a corporation has a right to communicate its views on all subjects without the government picking and choosing the subjects that are acceptable for the public to hear. (*First National Bank of Boston v. Bellotti* (1978) 435 U.S. 765; see also *Police Department of Chicago v. Mosley* (1972) 408 U.S. 92; *Pacific Gas and Electric Company v. Berkeley* (1976) 60 Cal.App.3d 123, 131 Cal.Rptr. 350.) Since First Amendment freedoms occupy a "preferred position," they cannot be infringed unless the state shows a compelling state interest in curbing them.[2] (See *Louisiana v. NAACP* (1961) 366 U.S. 293; *Bates v. Little Rock* (1960) 361 U.S. 516; *NAACP v. Alabama* (1958) 357 U.S. 449.)

In fulfilling its public utility duty, a utility has a responsibility to communicate with its customers on many subjects that may well be considered by some segments of society to be "controversial." For example, that duty may involve informing customers about the need for conservation, the adequacy of energy supplies, the future sources of energy, the relationship between services and rates, customer safety and similar matters. Although some of these matters may, indeed, be considered by some to be

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[2]This Court has on occasions too numerous to mention affirmed that First Amendment freedoms are essential for all in a democratic society. For as stated in *Thornhill v. Alabama* (1940) 310 U.S. 88, 95-96:

> The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be *exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth.* Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgement of freedom of speech . . . impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government. [Emphasis added.]

Five years later, this Court in *Thomas v. Collins* (1945) 323 U.S. 516, 537 left no doubt that:

> The First Amendment is a charter for government, not for an institution of learning. "Free trade in ideas" means free trade in the opportunity to persuade to action, not merely to describe facts. Cf. *Abrams v. United States*, 250 U.S. 616, 624 (1919), and *Gitlow v. New York*, 268 U.S. 652, 672 (1925), dissenting opinions of Mr. Justice Holmes. Indeed, the whole history of the problem shows it is to the end of preventing action that repression is primarily directed and to preserving the right to urge it that the protections are given.

"controversial," they are, nevertheless, genuine public issues often debated during this current energy crisis. However, under the ruling of the court below, materials relating to these subjects, because they may be considered "controversial," could not be included with the customer's bill, even though many customers are desirous of receiving such information from the utility.

The underlying premise of the New York rule prohibiting the inclusion of certain views with a customer's bill is that government should limit a customer's exposure to a utility's views on certain public issues. But this Court has always prohibited government's interference with the free discussion of governmental affairs. For example, in *Mills v. Alabama* (1966) 384 U.S. 214, 218, it was observed that "there is practically universal agreement that a major purpose of the First Amendment was to protect the free discussion of governmental affairs."

More recently, this Court in *Buckley v. Valeo, supra,* at 49, emphasized that ". . . the First Amendment . . . was designed to 'secure the widest possible dissemination of information from diverse and antagonistic sources,' and 'to assure unfettered interchange of ideas for the bringing about of political and social change desired by the people.'" Yet, New York, by its police powers, would stifle the unfettered interchange of ideas by regulating the content of a utility's billing envelope.

Notwithstanding the fact that PSC's banning certain materials from the billing envelope clearly was content-based, the Court of Appeals of New York, nevertheless, erroneously concluded otherwise, stating: "No one viewpoint is singled

out for special treatment. . . ." (*Consolidated Edison Co. v. PSC* (1979) 417 N.Y.S.2d 30, 36.) To the contrary, it is clearly content-based because the viewpoint of a utility is singled out for special treatment when that viewpoint touches upon "controversial matters of public policy." In other words, any views of a utility may be expressed through the billing envelope as long as those views do not relate to matters of controversy dealing with public policy.

As pointed out by this Court in *Police Department of Chicago v. Mosley, supra,* at page 96: "There is an 'equality of status in the field of ideas' and government must afford all points of views an equal opportunity to be heard. . . ." Yet the New York court would allow non-controversial views to be included in the billing envelope. And, it would permit controversial views to be disseminated in the billing envelope as long as they do not represent the position of the utility.

However, discriminating against ideas that may be expressed strikes at the very core of our system of government. It is direct regulation of the content of speech because it permits government to determine whose views relating to public policy may or may not be included in the billing envelope. In *Mosley,* this Court spoke against discrimination based upon the content of speech and the person desiring to speak:

> Necessarily then . . . not to mention the First Amendment itself, *government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.* And it may not select which issues are worth discussing or debating. . . . Once a

> forum is opened up to assembly or speaking by some groups, *government may not prohibit others from assembling or speaking on the basis of what they intend to say.* Selective exclusions . . . may not be based on content alone, and may not be justified by reference to content alone. [*Id.*, at p. 96; emphasis added.][3]

It seems quite clear that the New York court would allow a utility to include any materials of its choosing in the billing envelope as long as that material is considered non-controversial. Moreover, New York would allow a utility to include controversial views on public policy from any source so long as such views did not support the position of the utility. This is unquestionably content-based, governmental regulation directed solely at utility speech which, in the absence of a compelling interest, is prohibited by the First Amendment.

B. New York Is Prohibited By The First Amendment From Determining What Views Of A Utility A Customer May Receive

In a democratic society, it is imperative that people have the right, free of governmental veto, to receive information

[3]Just recently, this Court, citing *Mosley*, again in *First National Bank of Boston v. Bellotti, supra*, reaffirmed that government may not dictate the subjects about which persons may speak:

> In the realm of protected speech, *the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speaker who may address a public issue* [citation omitted]. If a legislature may direct business corporations to "stick to business," it also may limit other corporations—religious, charitable, or civic—to their respective "business" when addressing the public. Such power in government to channel expression of views is unacceptable under the First Amendment. [*Id.*, at pp. 784-785, emphasis added.]

on all subjects.[4] As Professor Tribe has observed: "A right to speak may be said to exist when the Court will not allow government to justify a restriction on expressive conduct by a claim that the ideas or information expressed are dangerous; that the speaker may exercise liberty of expression in some other place, time, or manner; or that the speaker should be muffled in order that a diversity of viewpoints might be heard in the marketplace of ideas." (*Tribe,* American Constitutional Law, 1978 at p. 675.) Unfortunately, the court below, in erroneously concluding that the restriction was a time, place and manner regulation, completely ignored the right of customers to receive the viewpoints of a utility on controversial matters of public policy in the billing envelope.[5]

Customers, as consumers of utility services, need to be aware of what the utility has to say about issues of public concern which may affect the future supply of energy or other matters that may impact the future of the utility or the customer. As a minimum, the First Amendment guarantees a utility customer "access to discussion, debate, and

[4]PGandE serves over 9 million customers many of whom enjoy reading its monthly publication *Progress*. Many customers desire having information on all future sources of power, but because of section 453(d) such information may not be printed in *Progress* because it is mailed in the billing envelope. Moreover, if political matters vital to the future supply of energy are discussed in *Progress*, it may not, because of section 453(d), be included in the billing envelope even though customers may want to read the views of supplier of their energy so that they may properly evaluate the current energy situation.

[5]PGandE has printed in each issue of *Progress* the following: "Mailing list additions or deletions may be made by writing to PGandE office giving name, address and account number." Thus, if a person notifies PGandE not to include *Progress* in his billing envelope, it is not included therein.

the dissemination of information and ideas."[6] *First National Bank of Boston v. Bellotti, supra.* (*Id.,* at p. 783.)

For it is a fundamental premise of democracy that the people are presumed to have a certain amount of intelligence, and that they will be able, without governmental interference, to evaluate materials and make their own decisions about their worth:

> Moreover, the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. *They may consider in making their judgment the source and creditability of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced . . . it is a danger contemplated by the framers of the First Amendment.* [*First National Bank of Boston v. Bellotti, supra,* at p. 791-792, emphasis added.]

Furthermore, in *First National Bank of Boston v. Bellotti, supra,* this Court specifically rejected the paternalistic approach adopted by the court below. As stated by the *Bellotti* Court:

> Government is forbidden to assume the task of ultimate judgment, lest the people lose their ability to gov-

[6]New York would take from utility customers this cherished right —essential to a democracy—to read and evaluate all views of a public utility and decide the worth of such views for themselves. Almost 40 years ago, this Court cautioned against such governmental intrusions into the rights of the people:

> The freedom of speech and of the press guaranteed by the Constitution embrace at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace *all issues* about which information is needed or appropriate to enable members of society to cope with the exi-

> ern themselves. See *Thornhill v. Alabama,* 310 U. S. 88, 95, 60 S.Ct. 736, 740, 84 L.Ed 1093 (1940); Meiklejohn, The First Amendment is an Absolute, 1961 S.Ct. Rev. 245, 263. The *First Amendment rejects the "highly paternalistic" approach of statutes . . . which restrict what people may hear. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S., at 770, 96 S.Ct., at 1829; see *Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S., at 97, 97 S.Ct., at 1620; *Whitney v. California,* 274 U.S. 357, 377, 47 S.Ct. 641, 648, 71 L.Ed 1095 (1927) (Brandeis, J., concurring); *Abrams v. United States,* 250 U.S. 616, 630, 40 S.Ct. 17, 22, 63 L.Ed 1173 (1919) (Holmes, J., dissenting). [*Id.,* at p. 791, n. 31; emphasis added.]

In the present case, the court below, regardless of how noble its purpose, erred in upholding the state's alleged interest in vindicating "the privacy rights of utility customers," (*Consolidated Edison Co. v. PSC, supra,* at 36) by cutting off their right to receive the utility's viewpoint on "controversial" matters. Government cannot deny utility

> gencies of their period. [*Thornhill v. Alabama* (1940) 310 U.S. 88, 101-102; emphasis added.]

The court below, in ignoring the rights of customers, noted that Con Edison has the right to express its ideas in other forums. (*Consolidated Edison Co. v. PSC, supra,* at 36.) But the constitutional right to know means more than saying a customer may in other forums obtain the utility's views. For such a right to be meaningful, a customer must be able to receive information without governmental veto or interference with the content. See, e.g., *Meyer v. Nebraska* (1923) 262 U.S. 390 where the Court reversed a conviction for violating a state law by teaching German because the law interfered "with the opportunities of pupils to acquire knowledge." See also *Stanley v. Georgia* (1969) 394 U.S. 557 invalidating a statute which made it a crime to possess pornographic materials in one's own home. In *Lamont v. Postmaster General* (1965) 381 U.S. 301, this Court held that the First Amendment right to receive information was violated by a congressional requirement that persons wishing to receive mail from foreign government organizations publicly identify their wishes to do so.

customers their individual choice of deciding and evaluating for themselves the worth of materials received in the billing envelope.[7]

Even if New York's interest in protecting the sensibilities of utility customers from a utility's controversial views on public policy is a legitimate one, it makes absolutely no sense to ban those views from the billing envelope, if the utility can directly mail these same views to the customer in a separate envelope. In other words, if the views are truly offensive, they will remain offensive regardless of whether they reach the customer in the billing envelope or in a separate envelope. Hence, even if mailed separately, the customer's sensibilities should be equally aroused, and the protection allegedly afforded by banning the offensive material from the billing envelope would be at most illusory.

[7]"The inherent worth of speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union or individual." [*First National Bank of Boston v. Bellotti, supra,* at p. 777.] Moreover, continued the Court: "Freedom of expression has particular significance with respect to government because '[i]t is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression.' T. Emerson, Toward a General Theory of the First Amendment 9 (1966). See also A. Meiklejohn, Free Speech and Its Relation to Self-Government 24-26 (1948)." [*Id.*, at p. 777, n. 11.]

II

THERE IS NO COMPELLING GOVERNMENTAL INTEREST IN PROHIBITING A UTILITY FROM INCLUDING "CONTROVERSIAL MATTERS OF PUBLIC POLICY" IN ITS BILLING ENVELOPE

A. A State Cannot Decide For A Utility And Its Customers What Views Are Appropriate For Inclusion In The Billing Envelope

Attempts by New York to invade the billing envelope and extract therefrom controversial material relating to public policy strikes at the very heart of the First Amendment and must withstand strict or exacting scrutiny because such invasion is directed at speech itself (see *Buckley v. Valeo, supra,* and New York cannot prevail unless it shows "a subordinating interest which is compelling."[8] (*First National Bank of Boston v. Bellotti, supra* at 786.) Even if New York could show a compelling interest, which it has not shown, it must still employ means "closely drawn to avoid unnecessary abridgement. . . ." (*Buckley v. Valeo, supra,* at 25; see also *Shelton v. Tucker* (1960) 364 U.S. 479.)

[8]The burden of showing a compelling state interest so fundamental and overriding as to necessitate prohibiting a utility from disseminating its views in the billing envelope lies with the state. (*Elrod v. Burns* (1976) 427 U.S. 347; *NAACP v. Button* (1953) 371 U.S. 415, 438-439; *Welford v. Battaglia* (Del. 1972) 343 F.Supp. 143, 145; see also, Note, "Less Drastic Means and the First Amendment" (1969) 78 Yale L.J. 464; Ely (1970) "Legislature and Administrative Motivation In Constitutional Law" 79 Yale L.J. 1205.)

The fundamental purpose underlying the free speech guarantee is the national commitment to the principle "that debate on public issues should be uninhibited, robust and wide-open" (*New York Times v. Sullivan* (1964) 376 U.S. 254, 270), so that the public may be informed and educated on all views regardless of content or source.

The basic fallacy of the New York court's reasoning is its unwarranted assumption that the mere receipt of "controversial" information relating to public policy "is likely to offend the sensibilities of the recipient" and that the state "need not stand idly by and deny assistance to those who are inflamed by having a particular opinion foisted upon them" (*Id.*, at p. 36.) As a practical matter, no harm can be demonstrated by the mere receipt of "controversial" information in the billing envelope.[9] Customers are not forced to read the information; the choice is theirs to read or discard the information. Under the disguise of protecting utility customers, government cannot, consistent with the First Amendment, take from utility management the decision as to what materials may be inserted with a customer's bill, unless a compelling governmental interest can be clearly shown and there are no less drastic alternative means.[10]

To support its conclusion that "when the insert espouses the utility's viewpoint on a controversial question, it is as

[9]PGandE's *Progress* is a separate insert which is in no way attached to or a part of the customer's bill.

[10]See *Schneider v. State* (1939) 305 U.S. 147 where the court invalidated an anti-handbill ordinance as applied to distributors of labor, political and religious circulars despite the state's legitimate interest in minimizing litter, noise and traffic congestion and protecting people from fraud and invasion of privacy. (*Id.*, at 158, 160, 164.) As the Court pointed out: "There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets." (*Id.*, at 162.) Moreover, continued the Court: "Fraud may be ... punished by law. Trespass may similarly be forbidden." (*Id.* at 162) There is no indication that any of the material banned from the billing envelope in this case is false or misleading. If New York really wants to help protect utility customers from certain utility views, the proper procedure would be to permit the *customer* to inform the utility of his desire not to receive utility inserts with his bill.

likely to offend the sensibilities of the recipient as it is to elicit agreement" (*Consolidated Edison Company v. PSC, supra*, at 36), the New York court improperly relied upon *Rowan v. Post Office Department* (1970) 397 U.S. 728. *Rowan* involved a challenge to a federal statute which provided that a person who has received, by mail, a "pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative," (39 U.S.C. § 4009) may request the Postmaster General to issue an order "directing the sender and his agents or assigns to refrain from further mailings to the named addressee." (39 U.S.C. § 4009.) In upholding the constitutionality of that statute, this Court noted that a vendor does not have a constitutional right to send unwanted material into someone's home, and that a mailer's right to communicate must stop at the mailbox of an unreceptive addressee. (*Rowan v. Post Office Department, supra*, at pp. 736-737.)

Clearly, *Rowan* does not support the New York court's conclusion that the government may, as was done by the PSC in the present case, decide what materials may "offend the sensibilities" of recipients of such materials and therefore ban the materials from the billing envelope. To the contrary, *Rowan* supports the proposition that it is the *customer* not the government, who should decide what material he wishes to receive. The danger of allowing government to make that choice was expressly recognized by this Court in *Rowan*:

> Both the absoluteness of the citizen's right under Section 4009 and its finality are essential; *what may not be provocative to one person may well be to an-*

other. In operative effect the power of the householder under the statute is unlimited; he may prohibit the mailing of a dry goods catalog because he objects to the contents—or indeed the text of the language touting the merchandise. *Congress provided the sweeping power not only to protect privacy, but to avoid constitutional questions that might arise from vesting the power to make any discretionary evaluation of the material in a governmental official.* [*Rowan v. Post Office Department, supra,* at 737; emphasis added.]

If *Rowan* is in any way applicable to the present case, it clearly stands for the proposition that it is the *utility customer*, not PSC, who has the discretion to determine what may offend his or her sensibilities. To make clear that the choice was the individual's and not the government's, the *Rowan* Court stated: "The section was intended to allow the *addressee* complete and unfettered discretion in *electing* whether or not he desired to receive further material from a particular sender." (*Id.*, at 734; emphasis added.)

Unlike the situation in the *Rowan* case, PSC in the present case has taken from the utility customers the right to decide whether they want to receive with their bills controversial materials. By its paternalistic desire to shield utility customers from utility views on certain matters, the PSC has taken from the customer the "complete and unfettered discretion in electing whether or not [the customer] desired to receive . . . material from a particular sender" (*Id.*, at 734) and invested that "complete and unfettered discretion" in itself. This usurpation of the right to decide what may be received by a utility customer is in

direct conflict with the *Rowan* decision. *Rowan* never intended to give government the exclusive power to decide what views a utility customer may receive with his bill.

In essence, New York in order to protect the minds of utility customers seeks to extract from the billing envelope all views of utilities which touch upon controversial matters relating to public affairs. Mr. Justice Powell, speaking for this Court in *First National Bank of Boston v. Bellotti, supra,* clearly stated that speech which relates to public affairs is essential to self-government:

> The individual's interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion, although the two often converge. See G. Gunther, Constitutional Law 1044 (9th ed. 1975); T. Emerson, The System of Freedom of Expression 6 (1970). *The Court has declared, however, that "speech concerning public affairs is more than self-expression; it is the essence of self-government." Garrison v. Louisiana,* 379 U.S. 64, 74-75, 85 S.Ct. 209, 216, 13 L.Ed. 2d 125 (1964). *And self-government suffers when those in power suppress competing views on public issues "from diverse and antagonistic sources." Associated Press v. United States,* 326 U.S. 1, 20, 65 S.Ct. 1416, 1424, 89 L.Ed. 2013 (1945), quoted in *New York Times Co. v. Sullivan,* 376 U.S. 254, 266, 84 S.Ct. 710, 718, 11 L.Ed.2d 686 (1964). [*Id.*, at 777, n. 12; emphasis added.]

Accordingly, there is no compelling interest for New York's suppression of utility views on controversial matters of public policy and the right of customers to receive such views in their billing envelope.

B. Utility Customers Are Not A "Captive Audience" Needing Government To Protect The Privacy Of Their Homes From Utility Views On Controversial Matters Of Public Policy

In upholding the prohibition at issue in the present case, the New York court also cited *Cohen v. California* (1971) 403 U.S. 15 as support for the government's position that utility customers are a "captive audience" needing the state to protect the privacy rights of their homes. (*Consolidated Edison Co. v. PSC, supra,* at 36.) This reliance upon *Cohen* is misplaced. In *Cohen* a defendant was convicted of violating section 415 of the California Penal Code which at that time prohibited "maliciously and willfully disturbing the peace and quiet of any neighbor or person . . . by . . . offensive conduct." (*Id.*, at 20.) Cohen was arrested for wearing a jacket bearing the words "FUCK THE DRAFT" in a corridor of the Los Angeles County Courthouse. In reversing his conviction, this Court stated that, absent a more particularized and compelling reason for its action, California could not, consistent with the First Amendment, make the simple public display of the single, four-letter expletive a criminal offense.[11] (*Cohen v. California, supra,* at 21.)

Contrary to the apparent belief of the court below, *Cohen* does not support the claim that utility customers are a "captive audience" needing governmental protection from utility views on matters of controversial public policy

[11]Just as in the *Cohen* case, it is a criminal offense for a California utility to include materials of a political nature, in the billing envelope even if the material directly relates to the utility's ability to operate. (See section 453(d) and sections 2107-2113 of the California Public Utilities Code.

invading their homes. To justify the interference with the free flow of information, even into the privacy of the home, this Court emphasized in *Cohen* that the government must show a substantial privacy invasion of a magnitude that cannot be tolerated:

> While this court has recognized that government may properly act in many situations to prohibit intrusions into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue [citation omitted], we have at the same time consistently stressed that "we are often 'captive' . . . and subject to objectional speech" [citation omitted]. *The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.* Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections. [*Cohen v. California, supra,* at 21; emphasis added.]

In *Cohen,* this Court noted, as must be noted here, that people in the Los Angeles courthouse could avoid further bombardment of their sensibilities by simply averting their eyes. Upon receipt of a utility's bill inserts (which can in no way be equated with the visual impact of the words on Cohen's jacket), a customer may choose to read the materials or discard any part thereof or request that such material not be mailed with the bill.[12] However, the court

[12]The fact that utilities provide a public service and are subject to an extensive regulatory scheme cannot serve as a justification for divesting them of their right to communicate freely their views to their customers without governmental control of the content of their billing envelopes. (Cf. *Jackson v. Metropolitan Edison Company* (1975) 419 U.S. 345.)

below would deny a customer the opportunity to make that choice and would empower the government to decide for each customer which views of the utility are acceptable for the billing envelope. The Cohen Court rejected this approach:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. *It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us,* in the hope that use of such freedom would ultimately produce a more capable citizenry and more perfect policy and in the belief that no other approach would comport with the promise of individual dignity and choice upon which our political system rests [citation omitted]. [*Cohen v. California* at p. 24; emphasis added.]

Erznoznik v. City of Jacksonville (1975) 422 U.S. 205, also cited by the court below for its contention that: "Given these circumstances, where the communication intrudes upon the privacy of the home, such a limitation does not offend the First Amendment [citations omitted],"[13] (*Con-*

[13]According to the court below:

> Consumers of utility services, like many others in captive situations, have no choice concerning receipt of a periodic statement from the power company. Whatever materials are enclosed in the envelope are destined to come in contact with the addressee. When the insert espouses the utility's viewpoint on a controversial question, it is as likely to offend the sensibilities of the recipient as it is to elicit agreement. Government need not stand idly by and deny assistance to those who are inflamed by having a particular opinion foisted upon them. "Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; we see no basis for according the printed word * * * a different or more preferred status because [it is] sent by mail. The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality, and none of the recognized exceptions includes any right to communicate of-

solidated Edison Company v. PSC, supra, at 37), does not support its position. *Erznoznik* involved a statute that made it a public nuisance and a punishable offense for a drive-in movie theatre to exhibit films containing nudity when the screen was visible from a public street or place. As observed by the Court in *Erznoznik;*

> *Appellee's primary argument is that it may protect its citizens against unwilling exposure to materials that may be offensive. Jacksonville's ordinance, however, does not protect citizens from all movies that might offend; rather it singles out films containing nudity, presumably because the lawmakers consider them especially offensive to passersby.*
>
> This Court has considered analogous issues—pitting the First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers or auditors—in a variety of contexts [citations omitted]. Such cases demand delicate balancing because:
>
> > "In th[e] sphere of collision between claims of privacy and those of [free speech or] free press, the interest of both sides are plainly rooted in the traditions and significant concerns of our society. [citation omitted]" [*Erznoznik v. City of Jacksonville, supra,* at p. 208-209 emphasis added.]

Similar to the Erznoznik case, the PSC's ban in the present case does not protect utility customers from all

fensively with another" (*Rowan v. Post Office Dept.*, 397 U.S. 728, 737; see, also, *Martin v. Struthers,* 319 U.S. 141; Black, He Cannot Choose But Hear: The Plight of the Captive Auditor, 53 Colum L Rev 960). A governmental agency such as the PSC may take appropriate steps to protect this privacy right of its constituents (*Kovacs v. Cooper, supra* at pp 86-89; *Cohen v. California,* 403 U.S. 15, 21-22; see, also, *Public Utilities Comm'n v. Pollak,* 343 U.S. 451, 466-469) [Douglas, J. dissenting]). [*Consolidated Edison Co. v. PSC, supra,* at 36-37.]

materials that might offend their sensibilities, but rather singles out a utility's position on matters of "public policy" that the government, in its discretion, determines to be controversial.[14] In *Erznoznik,* this Court rejected the idea that government, except in very narrow circumstances,[15] may selectively "shield the public from some kinds of speech on the grounds that they are more offensive than others. . . ."[16] (*Id.*, at 209.) Moreover, the Court observed that:

> *The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and*

[14]Some customers do not believe there is a need to conserve energy and do not want to be reminded of the need to conserve energy. For example, some customers might be offended by being informed they should not heat their swimming pools at certain times. Because of vast differences in people, what offends the "sensibilities" of one customer may very well be information badly wanted by other customers.

[15]One such circumstance is when the speaker intrudes on the privacy of one's home as in *Rowan v. Post Office Department, supra,* where the court indicated it is within the discretion of the homeowner or recipient (as opposed to the government) to inform the Post Office of the desire not to receive certain offensive mail. Another circumstance is where a person cannot avoid the materials by simply averting his eyes as was the case in *Lehman v. City of Shaker Heights* (1974) 418 U.S. 298, where the issue was the posting of campaign posters inside city-owned buses. The rider on the bus in *Lehman* had no choice but be exposed to the posters. He could not avoid them by averting his eyes as in *Cohen.* In the case of utility bill inserts, a customer may simply elect to throw away the unwanted materials without reading them.

[16]The Court also observed:

> Although each case ultimately must depend on its own specific facts, some general principles have emerged. A State or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content. See *Kovacs v. Cooper, supra; Cox v. Louisiana,* 379 U.S. 536, 554 (1965); *Adderley v. Florida,* 385 U.S. 39 (1966). But when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. See, *e. g., Police Dept. of Chicago v. Mosley,* 408 U.S. 92 (1972); *Fowler v. Rhode Island,* 345 U.S. 67 (1953); *Kovacs v. Cooper,*

> *ingenious forms of expression, "we are inescapably captive audiences for many purposes." Rowan vs. Post Office Department, supra,* at 736. Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, *the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.* Rather, absent the narrower circumstances described above, *the burden normally falls upon the viewer to "avoid further bombardment of* [*his*] *sensibilities simply by averting* [*his*] *eyes.* [citations omitted]" [*Erznoznik v. City of Jacksonville, supra,* at 210-211; emphasis added.]

In the present case, no assistance is needed from the government since the customer may discard the materials and thus protect himself simply by not reading the utility's "controversial" views on public policy. On the other hand, if a customer does want to know the utility's position on a "controversial" subject that affects him or the utility, that customer would have the opportunity without government censorship to read and evaluate what the utility has to say. Therefore, there is no conceivable compelling governmental interest or rational reason for New York's alleged interest in vindicating the privacy rights of utility customers.

supra, at 97 (Jackson, J., concurring). Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home, [citation omitted] or the degree of captivity makes it impractical for the unwilling viewer to avoid exposure. [citation omitted] [*Erznoznik v. City of Jacksonville, supra,* at 209.]

III

BECAUSE A UTILITY HAS A BUILT-IN METHOD FOR DISSEMINATING INFORMATION DOES NOT EMPOWER A STATE TO LIMIT THE VIEWS THAT MAY BE DISSEMINATED THROUGH THAT MECHANISM

Underlying New York's attempt to scrutinize materials that are included with a customer's bill is the assumption that since a utility has an institutional method for disseminating its views (the billing envelope), government has an interest in controlling the views that may be expressed through this medium. Stated simply, New York's intent is to prevent a utility from utilizing its built-in mechanism for disseminating its views since others do not have equal means of disseminating their views.

While this seemingly "noble" governmental purpose may appear reasonable, it collides head-on with the First Amendment. Restricting the speech of those who have the means of expressing their ideas so as not to place persons with less effective means of communicating their views at a disadvantage, has been expressly rejected by this Court. (*Buckley v. Valeo, supra,* at 48-49.) Moreover, not only the concept of equalizing the voices of others has been rejected, but also the idea of suppressing advocacy by those with means of communicating, because others do not have equal means of advocacy, has been rejected. (*Buckley v. Valeo, supra,* at 48-49.)

Some utilities, as other corporations, utilize their billing envelopes to communicate with their customers. This is an economical, reasonable and effective means of reaching a very diverse and wide audience. Separate mailings to

customers would be duplicative, and in many instances, because of the high costs of such mailings, would not be feasible. Denying a utility the use of its mechanism for communicating what it advocates, because it may "unduly persuade" others, also has been rejected. As correctly stated in *First National Bank of Boston v. Bellotti, supra,* ". . . the fact that advocacy may persuade . . . is hardly a reason to suppress it: The Constitution 'protects expression which is eloquent no less than that which is unconvincing.' *Kingsley Int'l Pictures Corp. v. Regents,* 360 US, at 689, 3 L Ed 2d 1512, 79 S Ct 1362." (*Id.,* at 791.)

Limiting the speech of some to enhance the voices of others has been expressly rejected:

> *But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment,* which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,' " and " 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' " New York Times Co. v. Sullivan, supra, at 266, 269, 11 L Ed 2d 686, 84 S Ct 710, 95 ALR2d 1412, quoting Associated Press v United States, 326 US 1, 20, 89 L Ed 2013, 65 S Ct 1416 (1945) and Roth v. United States, 354 US, at 484, 1 L Ed 2d 1498, 77 S Ct 1304, 14 Ohio Ops 2d 331. The First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion. Cf. Eastern R. Conf. v. Noerr Motors, 365 US 127, 139, 5 L Ed 2d 464, 81 S Ct 523 (1961). [*Buckley v. Valeo, supra,* at 48-49; emphasis added.]

By dictating the content of the billing envelope, New York is, in effect, determining the ultimate messages communicated to utility customers, and thereby forcing utilities not to print matters that they wish to print. This control over matters to be printed by utilities is constitutionally objectionable, and cannot be justified by asserting that there are alternative means of communicating available to utilities. In *Miami Herald Publishing Co. v. Tornillo*,[17] (1974) 418 U.S. 241, 256, Mr. Chief Justice Burger, writing for the Court observed: "We see that beginning with *Associated Press v. United States, supra* [326 U.S. 1 (1945)] the Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government . . . to print that which it would not otherwise print."[18]

In the instant case, the court below took the untenable position that because the PSC's ban left open other avenues of expression to the utility it was a legitimate state function to prescribe the content of the billing envelope.[19] How-

[17]The issue in *Tornillo* was whether a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper violated the guarantees of a free press.

[18]The *Tornillo* opinion also pointed out: "Dissenting in *Pittsburgh Press Co.* [*v. Human Relations Comm'n*, 413 U.S. (1973)], Mr. Justice Stewart, joined by Mr. Justice Douglas, expressed the view that 'no government agency—local, state, or federal—can tell a newspaper in advance what it can print and what it cannot.' *Id.*, at 400. See *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F. 2d 133, 135 (CA9 1971)". [*Miami Herald v. Tornillo, supra*, at 255-256.]

[19]According to the New York court:

> There is no doubt but that the regulation leaves open numerous alternative means of communication. On its face, the ban only reaches expressional activity conducted through the billing envelope. Whatever other modes of speech were open to utilities prior to the effective date of the commission order remain

ever, arguing that the ban leaves open numerous alternatives cannot withstand constitutional challenge. In essence, such an argument says that a utility is free to communicate its "controversial" views in any other manner it desires so long as the billing envelope is not utilized. But denying a utility the use of its readily available mechanism for communicating and compelling it to seek alternative means of communicating its "controversial" speech on public policy matters exacts a penalty based upon the content of the speech. (See *Miami Herald Publishing Co. v. Tornillo, supra,* at 256.)

Prohibiting a utility from utilizing its institutional method for mailing its views if they contain controversial matters of public policy clearly takes from the utility the discretion to determine the contents of its publication. Faced with the prospect of having to seek alternative and more expensive means of disseminating its publication, if controversial matters of public policy are included therein, the utility "might well conclude that the safe course is to avoid controversy." (Id., at 257.) This is true especially in California because of the criminal penalty assessable pursuant to section 453(d) if a utility elects to assert its views on matters of public policy in any publication it wishes to include in the billing envelope.

Rather than run the risk of incurring governmental sanction for espousing ideas on public policy that the government considers controversial, a utility must act as

> available. That the cost of utilizing these alternative channels may be higher is not determinative, especially where, as here, petitioner has wholly failed to demonstrate that it will be effectively precluded from exercising its rights (see e.g., *Kovacs v. Cooper*, 336 U.S. 77, 88-89, 69 S.Ct 448, 93 L.Ed 513, *supra*). [*Consolidated Edison Co. v. PSC, supra,* at 36.]

a self-censor, expressing only those views which it feels do not touch upon what the government may consider to be controversial matters of public policy. This fear of governmental sanction "dampens the vigor and limits the variety of public debate," (*New York Times v. Sullivan, supra,* at 279; see also *Miami Herald Publishing Co. v. Tornillo, supra,* at 257.) and exacts a penalty based upon content if a utility uses its readily available facilities to communicate certain ideas.

In *Tornillo* a state statute which exacted a penalty on the basis of content was invalidated:

> The Florida statute exacts a penalty on the basis of the content. . . . The first phase of the penalty resulting from the compelled printing of a reply is exacted in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print. It is correct, as appellee contends, that a newspaper is not subject to the finite technological limitations of time that confront a broadcaster but it is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available. [*Id.,* at 256-257.]

Although a utility is not a newspaper, the First Amendment is by no means limited to newspaper publishers but rather applies to all who seek to express their ideas. In other words: " '[T]he purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in this right to print what they will as well as to utter it. . . . the liberty of the press is no greater and no less . . . than the liberty of every citizen of the

Republic' *Pennekamp v Florida,* 328 U.S. 331, 364, 90 L Ed 1295, 66 S Ct 1029 (1946) (Frankfurter, J., Concurring)" (*First National Bank of Boston v. Bellotti, supra,* at 802 [Burger, C.J., Concurring].) Thus, New York's attempt to exact a penalty from utilities when they speak on certain public policy matters, merely because they have effective and economical means for disseminating their views, is contrary to the principles of the First Amendment.

CONCLUSION

Amici Curiae respectfully urge this Court to reaffirm the fundamental principle that free speech means that government cannot pick and choose the views that may be disseminated to utility customers. The First Amendment mandates that there be a free flow of information from all sources, including utilities, without governmental invasion of utility bills to ban what it considers to be a utility's position on controversial public policy matters. Therefore, Amici Curiae respectfully submit that the judgment of the Court of Appeals of New York should be reversed.

Dated: November 14, 1979.

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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

On Appeal From the Court of Appeals of the State of New York.

BRIEF OF MOBIL CORPORATION AS AMICUS CURIAE.

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PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK.

BRIEF OF MOBIL CORPORATION AS AMICUS CURIAE.

Mobil Corporation ("Mobil") respectfully submits this brief as *amicus curiae* [1] urging the Court to reverse the decision of the Court of Appeals of New York, because that decision and the decision of this Court on the important questions involved may affect its ability to participate in free and open expression concerning public issues.

1. Pursuant to Rule 42(2), there have been lodged with the Clerk the written consents of counsel for Consolidated Edison Company of New York, Inc., appellant, and of counsel for the Public Service Commission of the State of New York, appellee, to the filing of this Brief *Amicus Curiae*.

THE INTEREST OF MOBIL CORPORATION.

This case concerns direct interference by the State of New York with First Amendment-protected speech in the form of written communications by a private corporation on important, controversial issues of public policy. The sweeping, governmental ban on speech concerning matters of governing importance at issue in this case constitutes a frontal assault on the core of the First Amendment. The issues involve not only the right of expression but the right of citizens to have unfettered access to informed viewpoints on public policy issues currently the subject of intensive debate.

Unconstitutional restrictions on written communications by regulated, privately-owned public utilities similar to the New York regulation involved in this case have been put into effect or are being considered in several states other than New York.[2]

2. Bill insert bans are prohibited in California (Cal. Pub. Util. Code § 453(d)) and have been or are being considered by public regulatory agencies in Pennsylvania, Iowa, Maine and North Carolina. *Expenditures by Utilities for Advertising*, 76 PRMD-6, Pa. Bulletin, Vol. 6, No. 38, September 4, 1976, at 2218 (Pennsylvania P. U. C.); *Citizens United for Responsible Energy v. Iowa Paper and Light Co.*, Docket No. C-5-185 (Iowa State Commerce Commission, orders dated October 10 and 31, 1975); *In Re Petition of Committee for Cheaper Electrical Rates*, F. C. #2026 (Maine P. U. C. October 16, 1973); *In Re Investigation and Rulemaking Relating To What May Be Included As a Utility Bill Insert*, Docket No. M-100, Sub 80 (November 10, 1978).

In addition to imposing a flat prohibition on written communications with customers by the inexpensive and effective means of bill inserts, many state public utility commissions are now extensively engaged in subtle and arbitrary forms of censorship of private, investor-owned public utilities through the mechanism of regulations classifying types of speech and disallowing expenditures made for such speech for ratemaking purposes. See, McMahon, *"State Regulation of Advertising by Investor-Owned Electric Utilities: The Development of Current Standards and Their Constitutional Limits"*, 12 IND. L. REV. 603 (1979); NOTE, *"Advertising by Public Utilities As An Allowable Expense For Ratemaking:*

Mobil is a Delaware corporation which is principally engaged in business in the United States and international energy industries. Its wholly owned subsidiary, Mobil Oil Corporation ("Mobil Oil"), conducts an integrated international energy business including the exploration, production, transportation, refining and marketing of petroleum, petrochemicals, natural gas and products thereof. The petroleum industry in the United States is currently subject to extensive governmental regulation including price and allocation controls on crude oil and certain refinery products. In 1978, Congress enacted the Natural Gas Policy Act, 15 U. S. C. §§ 3301-3432 and 42 U. S. C. § 7255, which placed price controls on intrastate sales of natural gas that had theretofore been exempt from such control. In addition, under the authority of the Emergency Petroleum Allocation Act of 1973, 15 U. S. C. §§ 751 *et seq.*, and the Economic Stabilization Act of 1970, as amended, 15 U. S. C. § 1026, the Department of Energy and its predecessors have promulgated regulations which place pricing restrictions on refiners of petroleum products, 12 C. F. R., Part 212, Subpart E. Mobil is also subject to regulations issued by the Wage and Price Council under the Act Establishing the Council on Wage and Price Stability, Pub. L. 93-37 and Executive Order 12092, Novem-

2. (Cont'd.)

Assault on Management Prerogative", 13 VALPARAISO L. REV. 87 (1978); NOTE, *"Utility Companies and the First Amendment: Regulating the Use of Political Inserts in Utility Bills*, 64 VA. L. REV. 921 (1978). Compounding these developments, Congress in 1978 enacted the Public Utility Regulatory Policies Act of 1978 (PURPA), Pub. L. No. 95-617, §§ 101-43, 92 Stat. 3117 (1978) (to be codified in 16 U. S. C. §§ 2611-44 and 42 U. S. C. §§ 6801-08), which contains provisions requiring state regulatory agencies to exclude the costs of political and promotional advertising from utility rates unless the agencies find that such exclusion would not tend to further the purpose of the Act or would not be consistent with applicable state law.

ber 1, 1978, as amended by Executive Order 12161, October 2, 1979. In addition, several states, including New Mexico, Kansas and Texas,[3] treat operators of intrastate pipelines for intrastate shipment of petroleum as public utilities subject to state regulation.

Mobil has a continuing interest in communicating with its customers, as well as its shareholders, employees and suppliers, concerning important public policy issues, including the wisdom of aspects of federal and state regulation and proposed legislation, which might be deemed to be "controversial" by state and federal regulatory officials charged with the administration of the extensive regulatory schemes currently in place. Because of the importance to Mobil of the on-going, politically-charged debate on energy policy issues and other important economic questions, Mobil has a duty to its stockholders to maintain, and has a vital interest in maintaining, its right to participate in free and open public debate of these issues and to reply to inaccurate and misleading viewpoints in the most effective means available to it, uninhibited by government censorship.

The current threat—illustrated by the action of the Public Service Commission of New York and the decision of the New York Court of Appeals in this case—of flat prohibition of written communication with customers through bill inserts by private corporations subject to state and federal regulation represents a direct effort to stifle public debate on important public issues. In addition to depriving the public of a free flow of important information and balanced opinion on public affairs, it threatens vital interests of Mobil.

The preservation of the unfettered right to communicate by means of conventional means such as the

3. N. M. S. A. 70-3-1 *et seq.*; Texas Nat. Res. Code §§ 111.181, 111.183; Kan. Stat. § 55-501.

United States mails on controversial matters of public policy assumes special importance to the business community in view of the refusal of major television networks to accept paid advertisements by corporations on important questions of public policy, including advertisements seeking to *correct misstatements* in radio and television network news coverage and commentary. The television networks have persisted in their arbitrary refusal to accept such advertising even though Mobil has offered to purchase equal time for responses to its messages. Mr. Chief Justice Burger's observation in *First National Bank of Boston v. Bellotti*, 435 U. S. 765, 796 (1978), that "it could be argued that such media conglomerates . . . pose a much more realistic threat to valid interests than do appellants [the First National Bank of Boston *et al.*] and similar entities not regularly concerned with shaping popular opinion on public issues" has, in fact, been borne out by the effective and arbitrary foreclosure of the major electronic media to communications by the business community on public policy questions. *See e.g.*, "The Impossible Freedom", Mobil advertisement in "The New York Times", November 8, 1979 (television network denial of access to advocacy advertising); "19 Dull and Unsensational Facts About Our Profits the TV Networks Didn't Tell You—and Won't Allow Us to Tell You," Mobil advertisement in "The New York Times," November 5, 1979, at B4; "How CBS on October 24, 1979 Prefabricated the News," Mobil advertisement in "The New York Times," November 5, 1979, at B5; "Chilling the Debate," Mobil advertisement in "The New York Times," May 31, 1979; "Thank You, Walter Cronkite," Mobil advertisement in "The New York Times," January 20, 1977; "What Ever Happened to Fair Play," Mobil advertisement in "The New York Times," March 5, 1976; "Freedom Is Everybody's Right," Mobil advertisement in "The New York Times,"

March 5, 1976; "Why Do Two Networks Refuse To Run This Commercial?" Mobil advertisement in "The New York Times," July 17, 1974; "Can a Corporation Speak Its Mind in Public?" Kaiser Aluminum & Chemical Corporation advertisement in "The New York Times," June 19, 1979 (concerning refusal of three major networks to accept Kaiser advertisements on public policy issues).

In the absence of a definitive ruling invalidating the New York regulation in this case, federal and state regulatory agencies which currently have less restrictive policies may enact similar prohibitory regulations which would disadvantage Mobil and would prevent full public consideration of important public policy questions.

SUMMARY OF THE ARGUMENT.

1. Expression on public issues lies at the core of the First Amendment's protection, and the mails are a conventional and favored Federal instrumentality for the dissemination of such expression over which the States possess no power of censorship.

2. Expression on public issues is entitled to no less protection merely because the source of such expression is a corporation.

3. The New York Public Service Commission's ban on utility inserts addressing controversial matters of public policy is an impermissible prior restraint upon the dissemination of expression on public issues through the mails.

4. The State has no legitimate interest, much less a "compelling" interest, in restraining speech on public issues. The state may not constitutionally censor the mail and deprive willing prospective recipients of protected speech on the entirely hypothetical ground that some prospective speech by investor-owned utilities might be "offensive" to some recipient.

5. The Public Service Commission's Order banning communication with respect to a class of "controversial" issues is not content-neutral and cannot be sustained on the ground that other means for disseminating such expression, which are prohibitively more expensive and less effective, are not foreclosed by Order of the State.

6. The Public Service Commission's Order banning bill inserts concerning "controversial matters of public policy" rests on a subjective distinction between "controversial" and noncontroversial viewpoints which is inherently incapable of precise delineation. The Order subjects protected speech to the standardless discretion of

State officials, impermissibly chills the exercise of the freedom of expression, and interferes with the operation of vital democratic processes by crippling debate on public issues.

ARGUMENT.

I. New York's Flat Prohibition of Written Communications by Private Utilities With Their Customers Through Bill Inserts Concerning "Controversial Matters of Public Policy" Denies the Freedom of Speech and of the Press Guaranteed by the First Amendment.

This case is a constitutional challenge, brought by a New York public utility under the First and Fourteenth Amendments to the United States Constitution, to the validity of an Order ("the Order") of the Public Service Commission of the State of New York ("Commission"), dated February 25, 1977, a classic, impermissible restraint flatly banning the use of bill inserts by public utilities as a means of communicating with public utility customers on "controversial matters of public policy." The February 25, 1977 Commission Order provides, in relevant part:

> "All utilities subject to the jurisdiction of this Commission shall discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of *the utility's position on controversial matters of public policy.*" (Emphasis added)

This Order is directly focused on written communications "on controversial matters of public policy," and strikes at the very heart of protected expression. It is respectfully submitted, for the reasons which follow, that wholesale abolition of First Amendment rights by this blanket prohibition of written communications on matters of governing importance is inconsistent with the First and Fourteenth Amendments to the Constitution.

A. Private Written Communications by Mail Concerning "Controversial Matters of Public Policy" Enjoy the Most Extensive Protection of the First Amendment From Government Censorship.

The Order challenged in this case, barring communication on "controversial matters of public policy" by means of bill inserts sent through the mails, draws into play the most stringent standards of constitutional scrutiny.

In singling out for special regulation speech concerning "public policy" which may be deemed to be "controversial," the Order isolates that speech which lies at the very core of the protection guaranteed by the First Amendment. As the Court has many times reiterated, that Constitutional safeguard was founded on "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." *New York Times v. Sullivan,* 376 U. S. 254, 270-271 (1964). "For speech concerning public affairs is more than self-expression, it is the essence of self-government." *Garrison v. Louisiana,* 379 U. S. 64, 74-75 (1964). As the Court has said, "[T]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our Constitutional system." *Stromberg v. California,* 283 U. S. 359, 399 (1931).

In *Thornhill v. Alabama,* 310 U. S. 88 (1940), the Court broadly restated the central position of speech on questions of public policy:

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of a subsequent punishment . . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with exigencies of their period." 310 U. S. at 101-102.

The First Amendment "embodies our Nation's commitment to popular self-government and our abiding faith that the surest course for developing sound national policy lies in a free exchange of views on public issues. And public debate must not only be unfettered; it must also be informed. For that reason, this Court has repeatedly stated that First Amendment concerns encompass the receipt of information and ideas as well as the right of free expression. *Kleindienst v. Mandel,* 408 U.S. 753, 762 (1972); *Red Lion Broadcasting Co. v. F. C. C.,* 395 U. S. 367, 390 (1969); *Lamont v. Postmaster General,* 381 U. S. 301 (1965); *Martin v. City of Struthers,* 319 U. S. 141, 143 (1943)." *Saxbe v. Washington Post Co.,* 417 U. S. 843, 862-863 (1974) (Dissenting opinion of Mr. Justice Powell, joined by Mr. Justice Brennan and Mr. Justice Marshall). What is at stake here is "the societal function of the First Amendment in preserving free public discussion of governmental affairs. No aspect of that constitutional guarantee is more rightly treasured than its protection of the ability of our people through free and open debate to consider and resolve their own destiny." Id. at 862.

In *Buckley v. Valeo,* 424 U. S. 1 (1976), the Court once again reaffirmed the primacy of speech on public affairs: "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the]

unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' *Roth v. United States*, 354 U. S. 476, 484 (1957). Although First Amendment protections are not confined to 'the exposition of ideas,' *Winters v. New York*, 333 U. S. 507, 510 (1948), 'there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs . . . .' *Mills v. Alabama*, 384 U. S. 214, 218 (1966)." 424 U. S. at 14.

In *First National Bank of Boston v. Bellotti*, 435 U. S. 765 (1978), the Court invalidated a Massachusetts criminal statute prohibiting banks and business corporations from making expenditures for the purpose of influencing the vote on referendum proposals which imposed an indirect inhibition on expression addressed to public policy questions. In that case, the bank's speech on the public policy question involved in the referendum—a constitutional amendment permitting the legislature to impose a graduated tax on the income of individuals—"[fell] squarely" within the "heart of the First Amendment's protection." 435 U. S. at 776.

In *Friedman v. Rogers*, Nos. 77-1163, 1164 (Opinion filed February 21, 1979) at n. 10, the Court reiterated that "free discussion of governmental affairs 'is at the heart of the First Amendment's protection.' "

The rationale of the protection afforded by the First Amendment to speech on public affairs has been aptly stated by Professor Meiklejohn in these terms:

> "Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.* The principle of the freedom of speech springs from the necessities of the program of self-government." A. Meiklejohn, Free Speech 26 (1948) (emphasis in original).

This case, then, involves speech of the type that, under the decisions of this Court, has been afforded the most extensive protection of the First Amendment. It does not involve expression such as speech which does "no more than propose a commercial transaction,"[4] or expression which is "on the borderline between pornography and artistic expression"[5] which opinions of members of the Court have intimated may not receive the highest degree of protection under the First Amendment. *Linmark Associates, Inc. v. Township of Willingboro*, 431 U. S. 85, 98 (1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U. S. 748, 771-772 n. 24; *Young v. American Mini Theatres*, 427 U. S. 50, 61 (Opinion of Mr. Justice Stevens); *but see, Federal Communications Commission v. Pacifica Foundation*, 438 U. S. 726, 761-763 (concurring opinion of Mr. Justice Powell and dissenting opinion of Mr. Justice Brennan). Moreover, neither the legality of any conduct proposed nor the truthfulness of the prohibited speech is questioned.[6]

While the Court has noted that "each medium of expression presents special First Amendment problems", *Federal Communications Commission v. Pacifica Foundation*, 438 U. S. 726, 748 (1978), this case involves State

4. *Pittsburgh Press Co. v. Human Relations Commission*, 413 U. S. 376, 385 (1973).

5. *Young v. American Mini Theatres*, 427 U. S. 50, 61 (1976).

6. *Pittsburgh Press Co. v. Human Relations Commission*, 413 U. S. 376 (1973); *Bigelow v. Virginia*, 421 U. S. 809 (1975).

suppression of speech through a traditional medium of expression—private written communication through the United States mail concerning "controversial matters of public policy"—expression which has enjoyed the most expansive protection of the First Amendment. This case does not involve the practical difficulties of symbolic speech or meetings, parades, picketing, demonstrations, canvassing and other forms of expression involving elements of both speech and conduct.[7] It does not involve speech broadcast over electronic media, possessing "unique characteristics" which "make it especially subject to regulation in the public interest" and which traditionally receives "the most limited First Amendment protection."[8] It does not involve oral speech in public amplified electronically to produce sounds louder than the human voice.[9] It does not involve public display advertising.[10]

As the fundamental medium for protected expression, the mails enjoy the protection of the First Amendment from State intrusion. In *Ex Parte Jackson*, 96 U. S. 727 (1878), in which the Court stated that the mails may not be regulated in any manner so as to interfere with the freedom of the press, Mr. Justice Field wrote: "[l]iberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." The dissemination of ideas "can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."

7. *United States v. O'Brien*, 391 U. S. 367 (1968).

8. *Federal Communications Commission v. Pacifica Foundation*, 438 U. S. 726, 748 (1978); *Bates v. State Bar of Arizona*, 433 U. S. 350, 384 (1977); *Bigelow v. Virginia*, 421 U. S. 809, 825 n. 10 (1975); *Red Lion Broadcasting Co., Inc. v. Federal Communications Commission*, 395 U. S. 367, 386-387 (1969).

9. *Kovacs v. Cooper*, 336 U. S. 77 (1949).

10. *Lehman v. City of Shaker Heights*, 418 U. S. 298 (1974).

Lamont v. Postmaster General, supra, 381 U. S. at 308 (concurring opinion of Mr. Justice Brennan).

The mails have traditionally been the essential means for the dissemination of political thought and opinion and a favored conduit for information necessary to the full consideration of public issues. The history of the establishment of the post office shows that the framers of the Constitution were keenly alive to the vital role of the mails in democratic processes as a necessary instrumentality of government. Washington deemed the proper functioning of the mails essential to the full consideration of the Constitution itself.[11] The political fortunes and public acceptance of the early Republic depended on the mails, and in their anxiety to safeguard its life, the framers urged the prompt improvement of the postal system. In his annual messages in 1791, 1792, and 1793, Washington laid emphasis on the social and political importance of the mails:

11. On July 18, 1788, Washington wrote to John Jay concerning the organization of the post office:

> "It is extremely to be lamented that a new arrangement in the post office, unfavorable to the circulation of intelligence, should have taken place at the instant when the momentous question of a General Government was to come before the people. I have seen no good apology * * * for deviating from the old custom of permitting printers to exchange their papers by the mail. That practice was a great public convenience and gratification. If the privilege was not from convention an original right, it had from prescription strong pretensions for continuance, especially at so interesting a period. The interruptions in that mode of conveyance has not only given great concerns to the friends of the Constitution, who wished the public to be possessed of everything that might be printed on both sides of the question, but it has afforded its enemies very plausible pretexts for dealing out their scandals, and exciting jealousies by inducing a belief in the suppression of intelligence at that critical juncture was a wicked trick of policy, contrived by an aristocratic junto."
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> as quoted in Post and Neal, *Postal Economics* 10 (1918)

Third Annual Message, 1791:

"The importance of the post office and post roads on a plan sufficiently liberal and comprehensive, as they respect the expedition, safety, and facility of communication, is increased by their instrumentality in diffusing a knowledge of the laws and proceedings of the Government, which, while it contributes to the security of the people, serves also to guard them against the effects of misrepresentation and misconception. The establishment of additional cross-posts, especially to some of the important points in the western and northern parts of the Union, can not fail to be of national utility."

Fourth Annual Message, 1792:

"It is represented that some provisions in the law which establishes the post office, operate, in experiment, against the transmission of newspapers to distant parts of the country. Should this upon due inquiry be found to be the fact, a full conviction of the importance of facilitating the circulation of political intelligence and information will, I doubt not, lead to the application of a remedy."

Fifth Annual Message, 1793:

"But here I can forbear to recommend a repeal of the tax on the transportation of public prints. There is no resource so firm for the Government of the United States as the affections of the people, guided by an enlightened policy, and to this primary good nothing can conduce more than a faithful representation of public proceedings, diffused without restraint throughout the United States."

Post and Neal, *Some Postal Economics* 11 (1918)

Mr. Justice Story, in his *Commentaries on the Constitution of the United States, Abridgment* (1833), echoed these sentiments: "The post-office establishment has already become one of the most beneficent, and useful establishments under the national government. It circulates intelligence of a commercial, political, intellectual, and private nature, with incredible speed and regularity. It thus administers, in a very high degree, to the comfort, the interests, and the necessities of persons, as it were, in contact with each other; and thus softens the anxieties, increases the enjoyments, and cheers the solitude of millions of hearts. * * * Thus, its influences have become, in a public, as well as private view, of incalculable value to the permanent interests of the Union." Ch. XVIII, § 552, 396-397.

President Jackson in his first annual message to Congress said of the Post Office: "In a political point of view this Department is chiefly important as a means of diffusing knowledge. It is to the body politic what the veins and arteries are to the natural—conveying rapidly and regularly to the remotest parts of the system correct information of the operations of the Government, and bringing back to it the wishes and feelings of the people. Through its agency we have secured to ourselves the full enjoyment of the blessings of a free press." Richardson, comp., *Messages and Papers,* II: 460-61, as quoted in Fowler, *Unmailable: Congress and the Post Office* 21 (1977). In the first debate on postal censorship in 1836, provoked by the circulation through the mails of "incendiary matter" by the American Anti-Slavery Society, Congress itself concluded that it lacked power to censor the mails. Fowler, *Unmailable: Congress and the Post Office* 21-41 (1977); Rogers, *The Postal Power of Congress: A Study in Constitutional Expansion* 97-113 (1915). In *Ex Parte Jackson, supra,* the Court recounted the extensive consideration in Congress in 1836 of Congress' power, *vel non,* to exclude

publications from the mails by reason of their content. The report of the select committee of the Senate, chaired by Senator Calhoun, designated on that occasion to examine the question, is instructive. The report concluded:

> "After the most careful and deliberate investigation, they have been constrained to adopt the conclusion that Congress has not the power to pass such a law.
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> "The object of publishing is circulation, and to prohibit circulation is, in effect, to prohibit publication . . . and the prohibition of one may as effectually suppress such communication as the prohibition of the other, and, of course, would as effectually interfere with the freedom of the press, and be equally unconstitutional. . .
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> "From these remarks, it must be apparent that to prohibit publications on one side, and circulation through the mail on the other, of any paper, on account of its religious, moral or political character, rests on the same principle, and that each is equally an abridgment of the freedom of the press, and a violation of the constitution." S. Rep. 118, 24th Cong., 1st Sess. (1836), p. 1-4, as quoted in Deutsch, *"Freedom of the Press and of the Mails,"* 36 Mich. L. Rev. 703 (1938).

As the Court has said, quoting Mr. Justice Holmes' dissenting opinion in *Milwaukee Pub. Co. v. Burleson,* 255 U. S. 407, 437 (1921), "the use of the mails is almost as much a part of free speech as the right to use our tongues." *Procunier v. Martinez,* 416 U. S. 396, 422 (1974) (concurring opinion of Mr. Justice Marshall); *Blount v. Rizzi,* 400 U. S. 410, 416 (1971); *Lamont v. Postmaster General,* 381 U. S. 301, 305 (1965). The Court has acknowledged that the postal system, established by Congress pursuant to the exclusive powers conferred by Article 1, § 8, Cl. 7 of the Constitution, is by "now the main artery through which the business, social, and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare." *Lamont v. Postmaster General, supra,* 381 U. S. at 306. In view of the unique status of the mails as a means for the dissemination of vital expression on governmental matters, "[u]se of the postal power to regulate material that is not fraudulent or obscene raises 'grave constitutional questions.'" *F. C. C. v. Pacifica Foundation,* 438 U. S. 726, 741 n. 17; *Hannegan v. Esquire, Inc.,* 327 U. S. 146, 156 (1946).

The Court has construed in expansive fashion the First Amendment's guarantee to protect the dissemination of ideas through the mails from even more subtle forms of interference and inhibition by the Federal government—much less intrusive, direct censorship of the mails such as that imposed by New York in this case. *See, Smith v. United States,* 431 U. S. 291 (1977) (First Amendment standards define "obscene" matter mailed in violation of 18 U. S. C. § 1461); *United States v. Ramsey,* 431 U. S. 606 (1977) (First Amendment considerations in application of "border search" exception to incoming international mail); *Procunier v. Martinez,* 416 U. S. 396 (1974) (First Amendment protects against unjustified interference by State prison officials with direct personal correspondence of prison inmates); *Lamont v. Postmaster General,* 381 U. S. 301 (1965) (First Amendment protects right of addressee to receive politically unpopular materials through the mails); *Manual Enterprises, Inc. v. Day,* 370 U. S. 478 (1962) (First Amendment

standards for "obscene" matter applied to review of postal exclusion order entered under 18 U. S. C. § 1461); *Roth v. United States*, 354 U. S. 476 (1957) (First Amendment standards define "obscene" matter that may be excluded from the mails under 18 U. S. C. § 1461); *Hannegan v. Esquire, Inc.*, 327 U. S. 146 (1946) (First Amendment bars selective revocation of magazine's second class mailing permit on basis of "indecent" content).

In *Hannegan v. Esquire, Inc.*, 327 U. S. 146 (1946), the Court held that the Postmaster General could not constitutionally revoke a magazine's second class mail permit and relegate the magazine to a more expensive postal classification, on the basis of the Postmaster General's determination that the magazine contained "indecent, vulgar and risque," but non-obscene, matter. In *Lamont v. Postmaster General, supra*, the Court held that Congress may not require recipients of politically unpopular but constitutionally protected material to request in writing that the material be delivered to them. The Court concluded that the required notification in writing was an "unconstitutional abridgment" of First Amendment rights because the requirement was "almost certain to have a deterrent effect." 381 U. S. at 307.

This case involves the deliberate suppression by the State of speech of high governmental importance in its most innocuous medium: private written communication through the United States mails on "controversial matters of public policy." If within the firstness of the First Amendment there is a firstness also among the interests fostered by the Freedom of Speech and of the Press Clause, then it is the interest in the free flow of politically relevant information to the public. The sweeping prior restraint at issue in this case is expressly designed to cripple communication on "public policy" issues and to interfere

with that free flow of politically relevant information to the public. No conceivable justification can support it.

B. Corporate Speech on "Controversial Matters of Public Policy" Is Protected by the First Amendment.

The speech on "controversial matters of public policy" which is suppressed by the Order at issue in this case is not without First Amendment protection simply because the source of that speech is a corporation. In *First National Bank of Boston v. Bellotti*, 435 U. S. 765 (1978), the Court held that the First Amendment "protects interests broader than those of the party seeking their vindication." 435 U. S. at 776. The Court struck down a Massachusetts statute which imposed an indirect restraint upon the expression of opinion on public issues by corporations by prohibiting expenditures by corporations for the purpose of publishing such opinion or comment. Recognizing that the speech inhibited by the Massachusetts statute involved in that case was "the type of speech indispensable to decision making in a democracy" and that the "inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source," the Court rejected the assertion that expression by a corporation could, consistent with the First Amendment, be limited to speech pertaining directly to the corporation's business interests. The supreme importance of the governmental interests protected by the First Amendment prohibits interference with all sources of protected speech, particularly informed speech of the type "indispensable to decision making in a democracy." "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may ad-

dress a public issue. *Police Dept. of Chicago v. Mosley*, 408 U. S. 92, 96 (1972)." *First National Bank of Boston v. Bellotti, supra*, 435 U. S. at 784-785.

The principle supporting constitutional protection for speech concerning public issues, regardless of its source, is well-established in the decisions of the Court. In *Bigelow v. Virginia*, 421 U. S. 809 (1975), the Court reversed the conviction of a newspaper editor who had violated a Virginia statute by publishing an advertisement for an abortion referral service in New York. The statute in question constituted a direct restraint upon "what Virginians may *hear* or *read* about the New York services." 421 U. S. at 827. The Court said: "The policy of the First Amendment favors dissemination of information and opinion, and '[t]he guarantees of freedom of speech and press were not designed to prevent "the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential. . . ." 2 Cooley, Constitutional Limitations 886 (8th ed.).' *Curtis Publishing Co. v. Butts*, 338 U. S. 130, 150 (1967) (opinion of Harlan, J.)." 421 U. S. at 829. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U. S. 748 (1976), the Court invalidated a state statute declaring it unprofessional conduct for a licensed pharmacist to advertise the prices of prescription drugs. While a central question in that case was whether speech which "does no more than propose a commercial transaction" enjoys the protection of the First Amendment, the Court emphasized the vital First Amendment interest in preserving the free flow of even commercial advertising (425 U. S. at 756):

> "Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both. This is clear from the decided cases. In *Lamont v. Postmaster General*, 381 U. S. 301 (1965), the Court upheld the First Amendment rights of citizens to receive political publications sent from abroad. More recently, in *Kleindienst v. Mandel*, 408 U. S. 753, 762-763 (1972), we acknowledged that this Court has referred to a First Amendment right to 'receive information and ideas', and that freedom of speech 'necessarily protects the right to receive.' And in *Procunier v. Martinez*, 416 U. S. 396, 408-409 (1974), where censorship of prison inmates' mail was under examination, we thought it unnecessary to assess the First Amendment rights of the inmates themselves, for it was reasoned that such censorship equally infringed the rights of noninmates to whom the correspondence was addressed. There are numerous other expressions to the same effect in the Court's decisions. See, *e.g. Red Lion Broadcasting Co. v. FCC*, 395 U. S. 367, 390 (1969); *Stanley v. Georgia*, 394 U. S. 557, 564 (1969); *Griswold v. Connecticut*, 381 U. S. 479, 482 (1965); *Marsh v. Alabama*, 326 U. S. 501, 505 (1946); *Thomas v. Collins*, 323 U. S. 516, 534 (1945); *Martin v. Struthers*, 319 U. S. 141, 143 (1943)."

The same principle is applicable here. The Order of the Public Service Commission acts as a direct and specific restraint on the circulation through the mails to Con Edison's customers of bill inserts addressing "controversial matters of public policy."

Not only does the Order interfere directly with the circulation of protected speech on "controversial matters of public policy"—a species of expression which lies at the core of the First Amendment—the Order interferes with

speech by a corporation to its own customers, the very class of persons which would have the most animated interest in and need for the speech which the Order bans.

The Order is in direct conflict with prior pronouncements of this Court on permissible interference by the government with communications by corporations with their customers on matters of governing importance. In *United States v. C. I. O.*, 335 U. S. 106 (1948), the Court affirmed the dismissal of an indictment of a labor union for making an expenditure to publish in the July 4, 1947, issue of "The CIO News" an editorial specifically urging the election of a candidate for Congress. The indictment charged violation of what is now 2 U. S. C. § 44lb (and formerly 18 U. S. C. § 610), prohibiting labor unions and corporations from making contributions or expenditures in connection with federal elections. Because of the doubtful constitutionality of Act, the Court applied the rule of statutory construction requiring that statutes be construed, where possible, to avoid constitutional doubts and affirmed the dismissal of the indictment on the basis of a narrowing construction of the statute, under which the indictment failed to state an offense. The Court specifically adverted to the "gravest doubt" concerning the constitutionality which would arise if the statute were to be construed to interfere with communication between a corporation and its "customers" concerning public issues (335 U. S. at 121):

> "If [§ 44lb] were construed to prohibit the publication, by corporations and unions in the regular course of conducting their affairs of periodicals *advising their members, stockholders or customers of danger or advantage to their interests from the adoption of measures* or the election to office of men, espousing such measures, the gravest doubt would arise in our minds as to its constitutionality." (Emphasis added)

The Order of the Public Service Commission in this case is a direct interference with communications between New York public utilities and their customers of the very kind condemned by implication in the Court's opinion in *C. I. O.* It is also noteworthy that in *C. I. O.* four Justices concurred in the dismissal of the indictment on the precise ground that the Act is unconstitutional.

Unquestionably, then, the Order of the Public Service Commission challenged in this case draws into play the most exacting standards of review of legislation under the First Amendment. The Order is intended to stifle and does stifle and inhibit expression on a subject matter which plays a paramount role in democratic processes—expression the Court has said lies at the core of the First Amendment's guarantee. The Order bans, on the basis of its content, the circulation of such speech through the instrumentality of the mails—historically a fundamental vehicle for the circulation of information and opinion on vital questions of public policy. The Order directly interferes with communications between corporations and their customers on public affairs—communication which the Court has stated in the strongest terms is entitled to the protection of the First Amendment.

Wholesale abolition of rights and prior restraint of such speech cannot be reconciled with the First Amendment.

C. A Prior Restraint Forbidding Written Expression on "Controversial Matters of Public Policy" Is Not Justified by Any Legitimate Governmental Interest Resting on the Assumed "Offensiveness" to Recipients of Prospective Communications.

Governmental restrictions which, on their face, restrain the exercise of the freedoms of speech, press, peti-

tion and assembly guaranteed by the First Amendment do not come before this Court with the usual presumption of constitutionality. *Thomas v. Collins,* 323 U. S. 516, 530 (1945); *Thornhill v. Alabama,* 310 U. S. 88, 95 (1940); *Schneider v. State,* 308 U. S. 147, 161 (1939). The presumption is, to the contrary, that they are unconstitutional. *United States v. C. I. O.,* 335 U. S. 106, 140 (1948) (concurring opinion of Mr. Justice Rutledge); *cf. United States v. Carolene Products Co.,* 304 U. S. 144, 155, n. 4 (1938).

Such legislation must be subjected to "critical scrutiny." *First National Bank of Boston v. Bellotti, supra,* 435 U. S. at 786-787; *Buckley v. Valeo,* 424 U. S. 1, 11 (1976). It must satisfy rigorous standards. As the Court has frequently reiterated, "[b]road prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Buckley v. Valeo, supra,* 424 U. S. at 41; *N. A. A. C. P. v. Button,* 371 U. S. 415, 438 (1963); *United States v. Robel,* 389 U. S. 258, 265 (1967).

Blanket abolition of protected speech cannot survive these tests.

The fundamental test laid down in *First National Bank of Boston v. Bellotti, supra,* is applicable here:

> "where . . . a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, 'the State may prevail only upon showing a subordinating interest which is compelling,' *Bates v. Little Rock,* 361 U. S. 516, 524 (1960), see *N. A. A. C. P. v. Button,* 371 U. S. 415, 438-439 (1963); *N. A. A. C. P. v. Alabama,* 357 U. S. at 463; *Thomas v. Collins,* 323 U. S. 516, 530 (1945), 'and the burden is on the government to show the existence of such an interest.' *Elrod v. Burns,* 427 U. S. 347, 362 (1976)." *First National Bank of Boston v. Bellotti, supra,* 435 U. S. at 786.

Here the flat prohibition of the Order is plainly "directed at speech itself". The Order imposes no incidental inhibition on protected speech. The Order singles out speech addressed to public policy and absolutely bans such expression itself through the means of bill inserts sent through the mails.

Similarly, the Order singles out speech on "*controversial matters of public policy*". The term "controversial matters of public policy"—as vague and imprecise as it is—is plainly broad enough to encompass within its indiscriminate sweep speech which is "intimately related to the process of governing." It is sweeping enough to include statements by a utility concerning controversial issues such as the necessity for a national energy policy, the proper role and use of nuclear power to supply electric energy, the status of domestic and foreign fuel supplies, the effect of environmental costs on utility rates, and the wisdom of specific regulatory matters affecting pricing and the supply of fuel. The term "controversial matters of public policy" is broad enough to include remarks critical of the public behavior of the Public Service Commission and its officials and remarks critical of policies adopted by them which have a direct effect on the intended recipients of such communications, the public utility customers themselves, whether they are individuals or businesses. The Order is thus cast in language broad enough to suppress criticism of the very public officials who issued it, and it plainly prohibits speech that is "intimately related to the process of governing."

Under these circumstances, the Order may be sustained only upon showing "a subordinating interest which is compelling" and "the burden is on the government to show the existence of such an interest."

No compelling governmental interest exists to support the prohibition of the Public Service Commission's

Order. The Order is a classic prior restraint upon speech on "controversial matters of public policy," condemned by numerous decisions of this Court. *New York Times Co. v. United States,* 403 U. S. 713 (1971) (per curiam); *Organization for a Better Austin v. Keefe,* 402 U. S. 415 (1971); *Near v. Minnesota,* 283 U. S. 697 (1931). As the Court has said, any "system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity." *New York Times Co. v. United States, supra,* 403 U. S. at 714. Nor does this case present any of the "exceptional cases" which may relax the application of the doctrine condemning prior restraints. See *Near v. Minnesota, supra,* 283 U. S. at 716 (dictum).

The Order cannot survive these tests. It is said to be justified by the State's interest in protecting customers of public utilities from "offensive" messages included with their utility bills. The premise of this suggested justification is nothing but the unproved assumption that some customer might at some time disagree with some unspecified message from a utility on a "controversial matter of public policy." The Court of Appeals of New York, in its opinion below sustaining the Order said:

> "Consumers of utility services, like many others in captive situations, have no choice concerning receipt of a periodic statement from the power company. Whatever materials are enclosed in the envelope are destined to come in contact with the addressee. When the insert espouses the utility's viewpoint on a controversial question, *it is as likely to offend the sensibility of the recipient as it is to elicit agreement.* Government need not stand idly by and deny assistance to those who are inflamed by having a particular opinion foisted on them." Appendix to Jurisdictional Statement at 10a. (emphasis added)

Not only is this supposed justification of the Order not "compelling", it is wholly hypothetical. It is predicated on two unsupported assumptions. First, "unwilling recipients" of prohibited communications are assumed, and *willing* recipients are disregarded. Second, it assumes that such "unwilling recipients" would not only *disagree* with such hypothetical communications, but would find such communication on "controversial matters of public policy" to be "*offensive*". On the assumption that the hypothetical "offensiveness" of communications on "controversial" matters of public policy" rises to constitutional dimension, it was suggested that this rationale justifies the State in shielding *all* potential recipients, *in advance* and *without the consent of any* of them—including those who may agree with the communications, those who may disagree with them but not be "offended" by them, and those who may read them and be persuaded by them—from constitutionally protected speech. A clearer example of an impermissible interference by the State with the free flow of constitutionally protected speech on matters of high governing importance would be difficult to conceive.

Quite apart from the fact that it ignores the interests of utilities in participating in public debate on governmental issues, the decision of the Court of Appeals frustrates and disregards the constitutional interests of potential recipients who might be in agreement with communications from the utilities and subordinates those important interests to the interests of hypothetical recipients who might be "inflamed" or whose "sensibilities" might be "offended" by communications from public utilities on "controversial matters of public policy." The decision of the Court of Appeals also frustrates and disregards interests of constitutional dimension of those who might initially hold beliefs contrary to those espoused by

a utility but who might be persuaded by informed opinion communicated through the vehicle of bill inserts. The interests of willing recipients in receiving the materials are ignored and defeated. Finally, the decision below disregards the interest, embodied in the First Amendment in maintaining the free flow of information and opinion on public policy questions to ensure that each person may reach an informed judgment on important although "controversial" questions which might be discussed in such communications.

The constitutional deficiencies of the supposed rationale for this prior restraint are clear. As an attempted regulation by a state agency of what speech may be mailed, the Order lacks justification in any "compelling interest" of the State of New York. The power to establish and regulate the mails is a power conferred exclusively upon Congress—not the States—by Article 1 of the Constitution. Not only does the State of New York lack a "compelling interest" in this subject matter, it has no constitutionally legitimate interest in the subject matter at all, because it may not constitutionally exercise power to determine what constitutionally protected speech may be disseminated through the mails. As the Court said in *Smith v. United States*, 431 U. S. 291, 304 n. 10 (1977), adopting a nationally uniform construction of 18 U. S. C. § 1461, "[t]he regulation of the mails is a matter of particular federal concern. . . ." To the extent that the First Amendment leaves any room for the exercise of governmental power in this sphere, that power rests with Congress, not the States.

Insofar as it is suggested that this restraint may be justified as a means to protect the sensibilities of utility customers from "offensive" speech, the rationale proves both too much and too little. It proves too much because

it would justify a total ban by the Public Service Commission of all written communication by the utilities to their customers, including communications which are not sent with the utility bills. It proves too little because the Order is not limited in scope to prohibit only "offensive" communications; the Order prohibits *any* communication concerning "*controversial*" matters of public policy whether the communications are offensive or non-offensive. The Public Service Commission's Order is not genuinely concerned with the "offensive" nature of the speech of utilities or the manner of the speech. The Commission has not prohibited all "offensive" speech by utilities to their customers. The Commission has not prohibited utilities from sending "offensive" communications concerning "controversial matters of public policy" to their customers by means other than bill inserts. Nor has the Commission restricted *all* communication with utility customers by means of *bill inserts.* The Commission has only proscribed bill inserts addressed to "controversial matters of public policy." Thus, in terms of its proffered rationale, the Order is overbroad, since it is both over-inclusive and under-inclusive.

Quite apart from these deficiencies, the State's interest in prohibiting *some* speech on "controversial matters of public policy" which might be deemed to be "offensive" by *some* recipient is not a "compelling interest." It does not justify the censorship of communications to those recipients who might not find such communications "offensive". Moreover, the Court has long recognized that "a function of free speech under our system of government is to invite dispute . . . speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." *Terminiello v. Chicago*, 337 U. S. 1, 4 (1949); *Lehman v. City of Shaker Heights*, 418 U. S.

298, 319 (dissenting opinion of Mr. Justice Brennan, joined by Mr. Justice Powell, Mr. Justice Stewart, and Mr. Justice Marshall). The democratic enterprise, itself, envisions the forceful clash of ideology and opinion and the role of pungent debate in dislodging and neutralizing unexamined preconceptions and superstitions. The "offense to the sensibilities" produced by confrontation with contrary opinion on controversial matters of public policy is nothing less than the essential by-product of healthy public debate. In *Cohen v. California*, 403 U. S. 15, 24-25 (1971), the Court said: "[T]o many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense, not a sign of weakness but of strength. We cannot lose sight of the fact that, in what might otherwise seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are implicated." Thus, as Mr. Justice Stevens emphasized in *FCC v. Pacifica Foundation, supra*, 438 U. S. at 745: "the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." It is "firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U. S. 576, 592 (1969).

The State's asserted interest in protection of sensibilities of those hypothetical few who might be "offended"

by speech on controversial public issues is incompatible with the First Amendment and fundamentally opposed to the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." *New York Times v. Sullivan*, 376 U. S. 254, 270-271 (1964).

In *Erznoznik v. City of Jacksonville*, 422 U. S. 205 (1975), where the Court invalidated an ordinance making it a public nuisance and a punishable offense for a drive-in movie to exhibit films containing nudity, when the screen is visible from a public street or place, the Court elaborated on the very narrow compass of the Government's role as censor over "offensive" expression (422 U. S. at 210-211):

> ". . . [W]hen the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power."
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> * * *
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> The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, 'we are inescapably captive audiences for many purposes.' *Rowan v. Post Office Dept., supra*, at 736. Much that we encounter offends our esthetic, if not our political and moral sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, absent the narrow circumstances described above, the burden normally falls upon the viewer to 'avoid further bombardment of [his] sensibilities simply by averting [his] eyes.' *Cohen v. California, supra*, at 21: see also *Spence v. Washington*, 418 U. S. 405, 412 (1974)."

As in *Erznoznik v. City of Jacksonville,* the recipient of a bill insert from a public utility retains the option to "avoid further bombardment of his sensibilities simply by averting his eyes." The recipient of a leaflet in the form of a bill insert is under no compulsion to read it and may simply discard it, thereby avoiding any offense to the sensibilities. The insubstantiality of any inconvenience cannot justify a prior restraint which, without their consent, defeats the rights of willing recipients to have the information sent to them, free from governmental intrusion and interference.

The State's asserted interest in protecting the sensibilities of a hypothetical few who might regard as "offensive" a communication from a utility company concerning a "controversial matter of public policy" clearly does not constitute a "compelling interest" justifying a prior restraint suppressing the circulation through the mails of speech on matters of public importance. For these reasons alone, the Order cannot stand.

In attempted defense of the Order it is suggested that the Order is "content-neutral" and merely regulates the "time, place and manner" of the speech, leaving open alternatives other than the inexpensive, efficient and preferred method prohibited by the Order. There is no substance to this suggestion. The Order clearly discriminates in an impermissible fashion on the basis of content against protected communications in two ways. The Order prohibits bill inserts concerning "controversial matters of public policy." Thus the Order singles out for special proscription only communications on "*public policy*", leaving unproscribed the practice of including bill inserts addressed to subjects other than "public policy" issues. In addition, the Order discriminates between "public policy" communications which are "*controversial*"

and those which are non-controversial. The Order thus segregates for special proscription non-conforming views on public policy questions, substituting for the full spectrum of opinion which emerges from "uninhibited, robust and wide-open" debate views which are in dull conformity with conventional views on public policy. The Order proscribes communication on issues which are unsettled and unresolved—precisely those issues whose intelligent and democratic resolution benefits most from free and open debate—while permitting bland communication only on public policies which are already settled by unanimous agreement.

That the Order discriminates in general fashion between "public policy" issues and other subjects makes the Order no less a content-based restriction. "That the discrimination is among entire classes of ideas rather than among points of view within a particular class, does not render it any less odious. Subject matter or content censorship in any form is forbidden." *Lehman v. City of Shaker Heights, supra,* 418 U. S. at 316 (dissenting opinion of Mr. Justice Brennan).

Moreover, "[t]hat the proscription applies to one mode of communication, therefore does not transform the Order into a 'time, place or manner' case." *Linmark Associates, Inc. v. Willingboro,* 431 U. S. 85, 94 (1977).

The Order is not content-neutral and is in fundamental conflict with the First Amendment. *Police Dept. of Chicago v. Mosley,* 408 U. S. 92 (1972); *Erznoznik v. City of Jacksonville,* 422 U. S. 205 (1975).

The fact that the Commission has left open other means by which public utilities may communicate with their customers other than through the use of bill inserts does not justify the foreclosure of this less expensive and more effective vehicle of speech. The First Amendment

protects against unauthorized encroachment by the government on the means of circulation of expression. "[I]nhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government. See e.g. *Freedman v. Maryland,* 380 U. S. 50; *Garrison v. Louisiana,* 379 U. S. 64; *Speiser v. Randall,* 357 U. S. 513." *Lamont v. Postmaster General, supra,* 381 U. S. at 309 (concurring opinion of Mr. Justice Brennan).

An Order which forecloses one avenue of expression to that extent restrains speech and communication and impairs the functioning of the system of freedom of expression protected by the First Amendment as an adjunct to democratic processes. Moreover, by closing one means of circulation of information, a restraint on expression may make practically inacessible all vehicles for dissemination of opinion and information to certain potential speakers. For these reasons, the mere existence of alternative means of dissemination of speech does not justify the closure of other means of speech. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State,* 308 U. S. 147, 163 (1939). In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra,* 425 U. S. at 757 n. 15, the Court said: "We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means, such as seeking him out and asking him what it is."

While the Order does not prohibit utilities from sending communications on "controversial matters of public policy" through the mails to their customers in envelopes other than the envelopes containing utility bills, it is undisputed on this record that this alternative is prohibitively

more expensive. Insofar as the Order relegates utilities to the use of more expensive means of dissemination of constitutionally protected speech on public policy questions, solely because of the "controversial" nature of that speech, the Order infringes the First Amendment. *See, Hannegan v. Esquire,* 327 U. S. 146 (1946).

The State's asserted interest in the protection of the sensibilities of utility customers from controversial opinions on public issues is supported by neither *Rowan v. Post Office Dept.,* 397 U. S. 728 (1970) nor *Lehman v. City of Shaker Heights,* 418 U. S. 298 (1974). In *Rowan,* the Court upheld the constitutionality of a federal statute permitting a potential recipient of material bordering on the obscene to refuse delivery of the mail by notifying the post office and requesting that a directive be issued causing the removal of the recipient's name from the sender's mailing list. *Rowan* dealt with a federal restriction on delivery of mail, initiated by the recipient himself—not with intrusion by a State into this sphere without the consent of prospective recipients. Moreover, the only speech directly affected by the procedure established under the statute was unwanted mail deemed to be "erotically arousing or sexually provocative" by its prospective recipient. In sharp contrast with *Rowan,* the expression specifically proscribed by the Order at issue here lies at the core of the First Amendment's protection. In contrast with the federal statute upheld in *Rowan,* the vice of the Order involved in this case is that it does *not* leave to prospective recipients the decision whether or not to receive the communications at issue. The Order substitutes the indiscriminate hand of the State censor for the independent judgment of the prospective recipient and results in a sweeping, unjustified proscription of constitutionally protected speech. Moreover, in *Rowan* the Court carefully left open the constitutionality of one aspect of the federal statute there in

issue, 39 U. S. C. § 4009, which is analogous to the issue presented in this case. Section 4009(g) of the Act involved in *Rowan* allowed an adddresee to request the Postmaster General to include in any prohibitory order "*the names of any of his minor children who have not attained their nineteenth birthday, and who reside with the addressee.*" In a concurring opinion, Mr. Justice Brennan noted that this provision of the law gave rise to the "possibility . . . that parents could prevent their children, even if they are 18 years old, from receiving political, religious, or other materials that the parents find offensive." With respect to this aspect of § 4009(g), which is analogous to the restraint imposed by the Order, Mr. Justice Brennan pointedly observed that the delegation of powers of censorship over the mail to parents raised significantly different problems:

> "In my view, a statute so construed and applied is not without constitutional difficulties. Cf. *Tinker v. Des Moines School Dist.*, 393 U. S. 503 (1969); *Ginsberg v. New York*, 390 U. S. 629 (1968).
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> In these circumstances, I understand the Court to leave open the question of the right of older children to receive materials through the mail without governmental interference and also the more specific question whether § 4009(g) may constitutionally be applied with respect to all materials and to *all* children under 19." 397 U. S. at 741.

Lehman v. City of Shaker Heights, supra, which dealt with a restriction on display advertisements in government-owned transit cars, similarly does not support the State's asserted interest in "protecting" utility customers from controversial statements of position from utilities on public policy questions. In that case, there was no Opinion of the Court. Four Justices concluded that the publicly owned and controlled areas of communication on the transit car had not been dedicated as a forum for expression which was entitled to the protection of the First Amendment and that the City's decision to limit the use of the cars was within its discretion and involved no First Amendment violation. Four Justices would have declared the regulation unconstitutional. Unlike the transit cars in *Lehman,* where no First Amendment forum was found to exist, the mails are a well-established traditional means of disseminating speech on public affairs. Moreover, the Opinion of Mr. Justice Blackmun, who was joined by Mr. Chief Justice Burger, Mr. Justice White and Mr. Justice Rehnquist, rests explicitly on the distinction between "display advertising" and other forms of less intrusive, written communication.

II. New York's Sweeping and Indefinite Ban on Written Communications by Mail Concerning "Controversial Matters of Public Policy" Is Unconstitutionally Vague and Overbroad.

Quite apart from its facial unconstitutionality under the First Amendment, the Commission's Order must be invalidated because it deprives New York's public utilities of liberty without due process of law in contravention of the Due Process Clause of the Fourteenth Amendment. The imprecise and indefinite character of the language of the command is obvious:

> "All utilities subject to the jurisdiction of this Commission shall discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on *controversial matters of public policy.*" (Emphasis added).

The imprecision of the term "controversial matters of public policy" draws into play the familiar, exacting rules applicable where State regulation touches the exercise of the fundamental freedoms guaranteed by the First Amendment. Paramount among these standards is the requirement that regulation affecting the exercise of the First Amendment rights must be narrowly drawn to meet the precise evil it is intended to curb. *Cantwell v. Connecticut,* 310 U. S. 296 (1940); *Thornhill v. Alabama,* 310 U. S. 88 (1940); *Schneider v. State,* 308 U. S. 147 (1939); *DeJonge v. Oregon,* 299 U. S. 353 (1937). As the Court said in *Buckley v. Valeo, supra,* 424 U. S. at 40-41, "[C]lose examination of the specificity of the statutory limitation is required where, as here, the legislation imposes criminal penalties in an area permeated by First Amendment interests. See *Smith v. Goguen,* 415 U. S. 566, 573 (1974); *Cramp v. Board of Public Instruction,* 368 U. S. 278, 287-288 (1961); *Smith v. California,* 361 U. S. 147, 151 (1959). The test is whether the language of [the restriction] affords the '[p]recision of regulation [that] must be the touchstone in an area so closely touching our most precious freedoms.' *NAACP v. Button,* 371 U. S. at 438."

The vices of imprecise regulation in the First Amendment area are well delineated in this Court's opinion in *Buckley v. Valeo, supra,* where the Court said (424 U. S. at 41, n. 48):

> "In such circumstances, vague laws may not only 'trap the innocent by now providing fair warning' or foster 'arbitrary and discriminatory application' but also operate to inhibit protected expression by inducing 'citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.' *Grayned v. City of Rockford,* 408 U. S. 104, 108-109 (1972), quoting *Baggett v. Bullitt,* 377 U. S. 360, 372 (1964), quoting *Speiser v. Randall,* 357 U. S. 513, 526 (1958). 'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.' *NAACP v. Button,* 371 U. S. at 415, 433 (1963)."

The Commission's Order exhibits all of these vices.

The Commission's Order cannot satisfy the applicable standards. In prohibiting communications with customers by the mechanism of bill inserts, the Commission's Order attempts crudely to draw a distinction between communications concerning "public policy" and communications on issues unrelated to "public policy". But, as Mr. Justice Brennan said in *Lehman v. City of Shaker Heights,* 418 U. S. 298, 319 (dissenting opinion of Mr. Justice Brennan), "[t]he line between ideological and nonideological speech is impossible to draw with accuracy." Seemingly neutral non-ideological statements may be construed to be important premises or aspects of an ideology. Moreover, the Order seeks to single out for special proscription statements of a utility's position on "controversial" matters of public policy. The term "controversial" is undefined by the Order and its connotations practically defy enumeration. What is "controversial" is a subjective matter and is inherently incapable of precise definition in advance. "[W]hat may not be provocative to one person may well be to another." *Rowan v. Post Office Dept., supra,* 397 U.S. at 728. As Mr. Justice Harlan said, in a colorful phrase in *Cohen v. California, supra*: "one man's vulgarity is another man's lyric." 403 U. S. at 25.

The term "controversial" is no less vague than the language of the statute condemned in *Coates v. City of Cincinnati,* 402 U. S. 611 (1971), which made it a criminal

offense for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in *a manner annoying to persons passing by* . . . ." There, the Court pointed out that "[c]onduct that annoys some people does not annoy others." 402 U. S. at 614. As the Court observed: "the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensive normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, 'men of common intelligence must necessarily guess at its meaning.' *Connally v. General Construction Co.*, 269 U. S. 385, 391." 402 U. S. at 614.

While the statute is also unconstitutionally overbroad, measured by the standard of the supposed interest which the Commission sought to protect—the interest in preventing "offensive" communications which might "inflame" utility customers—the inherently indefinable aim of the Commission's order is the very same as that which the Court in *Coates v. Cincinnati* condemned as unconstitutionally unspecific and indefinite.

The language of the Order immediately raises another aspect of vague regulation which is inimical to the operation of democratic processes. As a standard for the Commission's regulation of constitutionally protected speech of utilities to their customers, the Order leaves wide discretion to the Commission to determine what speech is "controversial" and what speech is not. Speech may be found to be "controversial" and therefore barred solely because the Public Service Commission of New York does not agree with it. Moreover, on this ground, as has been pointed out, a utility's criticism of the Public Service Commission's policies or regulatory measures—addressed to the utility's customers, the very class of persons who may be most affected by it and therefore possessing the most legitimate

interest in receiving such communication—may be suppressed by the commission solely because of the Commission's sensitivity to the criticism. It is clear, however, that a primary purpose of the First Amendment was to protect speech which is critical of public officials. As the Court said in *New York Times v. Sullivan, supra*:

> ". . . we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U. S. at 270.

As the Court said: "Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. * * * Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations." 376 U. S. at 272-273.

The Commission's Order is inherently antithetical to core interests protected by the First Amendment and is unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment.

III. Conclusion.

The Order of the Public Service Commission of the State of New York challenged in this appeal, which totally bans bill inserts by regulated privately-owned utility companies in New York expressing views on "controversial matters of public policy", is a broadside assault on the freedom of political expression guaranteed by the First Amendment. No compelling or subordinating governmental interest justifies prior restraint on written communi-

cations concerning matters of public policy which are distributed by mail. New York's direct interference with and abridgment of the right of a private corporation to communicate with its customers in this manner on public policy questions plainly violates the First Amendment.

By reason of its vague and indiscriminate sweep, the Public Service Commission's prohibition against use of bill inserts to communicate the views of public utilities on "controversial matters of public policy" deprives them of liberty without due process of law in violation of the Fourteenth Amendment.

For these reasons, Mobil respectfully submits that the Judgment of the Court of Appeals of New York should be reversed.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979 No. 79-134

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Appellee*

Supreme Court, U. S.
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Brief *Amici Curiae* for Mid-Atlantic Legal Foundation, Mid-America Legal Foundation, Laurine Ryan and Michael Long in Support of the Appellant

On Appeal from the Court of Appeals of the State of New York.

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Brief *Amici Curiae* for Mid-Atlantic Legal Foundation, Mid-America Legal Foundation, Laurine Ryan and Michael Long in Support of the Appellant

---

On Appeal from the Court of Appeals of
the State of New York.

INTERESTS OF THE AMICI CURIAE

Pursuant to this Court's Rule 42, Mid-Atlantic Legal Foundation, Mid-America Legal Foundation, Laurine Ryan and Michael Long hereby move the Court for leave to file the attached brief as an *amici curiae*. Consent was secured from counsel for both parties. Copies of these letters have been filed with the Court.

Mid-Atlantic Legal Foundation is a nonprofit, tax exempt corporation organized and existing under the laws of Pennsylvania. Mid-America Legal Foundation enjoys similar status under the laws of Illinois. Both were organized for the purpose of engaging in litigation in matters affecting the broad public interest.

This amici brief is also presented on behalf of two recipients of Consolidated Edison's services who do not find its bill inserts objectionable and who would like to continue to receive them. Both parties acknowledge that they have not read *all* insert messages received in the past and may not read all those received in the future. Both believe that their privacy does not in any manner deteriorate by the receipt of these messages.

Mrs. Laurine Ryan receives and pays appellant's utility bills at both her residence, in Hartsdale, New York, and her business, in Hastings on the Hudson, New York.

Mr. Michael Long receives and pays appellant's utility bills at his residence and business addresses, both of which are located in Brooklyn, New York. The nature of his business, owner of an ice cream parlor, makes him a relatively high user of appellant's electricity.

SUMMARY OF THE ARGUMENT

The Court of Appeals of the State of New York has held that the Public Service Commission of the State of New York may bar utility companies from presenting statements and information concerning "controversial matters of public policy" within the billing envelopes sent to their customers. The *amici* argues that this regulation is an impermissible interference with the corporate exercise of First Amendment rights.

It asserts that a corporation has the right to speak out on controversial issues of mutual concern and that its customers have the right to be informed of corporate positions on such issues.

This Court has consistently reiterated the fact that the dissemination of information under the First Amendment is not based on either the nature of the communication nor its source. If the First Amendment is to retain its vitality, it must continue to protect the rights of dissidents from censorship based upon the personal predilections of the censor. By its regulation the Commission, an administrative agency, not even a duly constituted legislature, has spontaneously and inappropriately enabled itself to restrict the free flow of information on issues that at least one party believes should be given wide publicity.

Uncontroverted by either party is the availability of other means of communicating such beliefs. However, the economy and utility of the billing envelope make it the most facile means available to the appellant for accomplishing this purpose. Other methods of communication are burdensome, less like to be successful, and expensive.

The right of a communicant to utilize the most expeditious available means to disseminate legitimate and truthful commercial information is protected by the First Amendment as well as prior decisions of this Court.

ARGUMENT

I. The order of the New York Public Service Commission violates a utility's constitutional right to speak and the ratepayer's right to hear from management on controversial matters of mutual concern.

The order of the New York Public Service Commission challenged prohibits in relevant part "the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy." (Appellant's Appendix F at 58a).

At least one constitutional infirmity of the Commission's order lies in its broad scope and unjustifiable restriction on both the right of one class of speakers, public utilities, to contribute to public debate and on the right of one class of listeners, the ratepayers, to receive such information from the utility. Both groups have a legitimate right to unfettered communication appropriate to informed decisions on public policy issues of mutual interest. The ratepayers may be a captive audience, incapable of avoiding receipt of the utility's message. (Appellant's Appendix E at 43a). However, the utility likewise may be a captive speaker who cannot avoid the obligation to speak to the user audience on such matters. Increasing the cost of such communication necessarily restricts both the utility's right to speak and the consumer's right to hear from the utility on such controversial matters of public policy.

This Court has repeatedly recognized that discussion on controversial public issues is not only at the core of First Amendment protection but also the indispensable key to informed decision making in a democracy. *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 776-777 (1978). Yet this is precisely the type of speech which the order of the Public Service Commission limits.

Although the administrative restriction in question is nominally directed toward one cost-saving method of communication, such a limitation cannot pass constitutional muster where it effectively constitutes a prior restraint and reduces the extent of expression. Cost related limitations of the kind adopted by the Public Service Commission may be sustained only if they avoid suppression of protected communication. *Cf. Buckley v. Valeo,* 424 U.S. 1, 19 (1976).

Two of the governing principles in First Amendment analysis are the commitment of this Court to a free flow of information, regardless of the character of the speaker, and reliance on the "marketplace of ideas," not on administrative or legislative determinations to decide which viewpoint shall prevail. As Mr. Justice Brandeis eloquently stated "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression." *Whitney v. California,* 274 U.S. 357, 377 (1927) (Brandeis, J. concurring).

There is little doubt that corporate speech is entitled to the full panoply of First Amendment protection. Most of our popular media operate in the corporate form.

In a series of recent decisions, this Court has refused to limit First Amendment protection based on the corporate character of the speaker and has further recognized that the Constitution serves to protect both the speaker's right to speak and the listener's right to hear. *First National Bank of Boston v. Bellotti,* 435 U.S. at 765. The protection applies to the dissemination of commercial information about products and services as well as political information. *Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85 (1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976).

More specifically, in *Virginia State Board of Pharmacy* this Court, citing its earlier decisions in *Lamont v. Post-*

master General, 381 U.S. 301 (1965) and *Kleindienst v. Mandel,* 408 U.S. 753 (1972), concluded that the protection afforded by the First Amendment is "to the communication, to its source and to its recipients both." 425 U.S. at 756. Thus, any attempt to limit the scope of First Amendment protection by ignoring the right of the recipients to hear from a particular source information of legitimate interest is constitutionally infirm.

The order of the Public Service Commission is so encompassing that a utility company is barred from employing the insert mechanism to disseminate its views on topics directly related both to the operation of its business and to the direct interest of the ratepayer therein. Mere characterization of the subject as a "controversial matter of public policy" is the sole requisite for application of the Commission's order.

The Public Service Commission premised its order on the rationale that ratepayers were for practical purposes a captive audience incapable of avoiding the utility's message. In reaching this conclusion the Commission impliedly rejected the notion that the consumer had any interest either in the business and operation of the utility or in hearing what management had to say on controversial matters of public policy, despite the obvious and exclusive relationship between these two groups. The flaw in the Commission's order lies in its failure to afford any significance to this relationship or to recognize the reciprocal rights and obligations which flow from it. These include not only a right and obligation on the part of management to speak but also a correlative right on the part of consumers to hear what management has to say on matters irrespective of their controversial nature that relate to the business and operation of the utility.

The management of a public utility stands in a relationship to ratepayers not unlike the one it has to company shareholders. Certainly with respect to the latter group there would be no question that management had both a

right and obligation to speak on matters of public policy that relate to the business and operation of the company whether controversial or not. The foundation of this relationship lies in the shared interest and responsibility for operation of the business.

Dissidents share the First Amendment right to communicate. However, not sharing the obligation to communicate on matters of concern to the ratepayers or shareholders, they cannot lay equal claim to the use of an enterprise's facilities in communicating their views. How far the Public Service Commission, like the Securities and Exchange Commission, might go in affording dissident views access to normal corporate communications is a question not presented in this case. Nevertheless, an inability to assure perfect equality of access between management and dissident views is no justification for the abrogation of First Amendment rights. One could similarly purport to limit media editorials unless an equal opportunity to speak effectively could be assured to every citizen.

Similar to the shareholder, the utility ratepayer has an interest in the operation of the utility based on his or her use of the latter's products and services as well as in public policy matters which relate to the business of the utility. The Public Service Commission's order ignores the importance and significance of this relationship by unconstitutionally restricting the user's access to the utility's views and management's right and obligation to communicate those views on matters of mutual concern. If the subject of those views is characterized as "controversial," the restraint applies. Yet it is precisely in communication on controversial matters that the shared interest of the utility and its ratepayers is most clearly entitled to First Amendment protection.

There is no question that certain businesses, including utilities, are by the nature of the products and services they provide subject to regulation in the public interest. *Fletcher, Cyclopedia of the Law of Private Corporations*

§6673 (rev. perm. ed. 1975). Nor is there any question that management legitimately may be subject to regulation in the allocation and expenditure of corporate funds for purposes of participating in public debate.

The Commission's order limiting use of the bill insert mechanism for communication, however, transcends the boundaries of legitimate regulation, and includes within its proscribed ambit communications that have a legitimate business purpose, and are unquestionably subject to constitutional protection. Whether the Commission could have limited bill inserts on controversial matters of public policy to those which also had an appropriate relationship to the business or operation of the utility is a question not presented by the order at issue. Indeed, it was precisely on matters of utility business and operation, such as nuclear power, that the Commission sought to limit speech by the utility. (Appellant's Appendix E at 43a). The First Amendment cannot tolerate such a limitation.

Finally, while the Commission's order limits only one mechanism for communication, the bill insert, its practical effect is to restrain, if not foreclose, communication between management and the ratepayer on the proscribed topics because of the inefficiency and greater cost attached to any alternative communication. This Court clearly has recognized the inability of alternative channels to satisfy constitutional requirements where they are more expensive, less effective and less likely to reach the intended recipient. *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. at 93. Thus, the Commission's order is constitutionally defective not only in its limitation on communication between the utility and the ratepayer but also because of the absence of equivalent methods of communication.

II. The Order of the New York Public Service Commission invalidly restricts the First Amendment's protection of speech by prohibiting its corporate exercise on issues involving "controversial matters of public policy."

In its order dated July 6, 1977, the Public Service Commission failed to define "controversial matters of public policy" and assumed responsibility for censoring non-obscene commercial information under a dictate which might be considered excessive in countries bereft of First Amendment rights. The Commission utilized a vague legislative mandate permitting it to regulate billing formats to justify this prohibition.

By its nature, utilization of mail to gain support for ideas involves a biased presentation of opinion in contrast to that disseminated by news or broadcast media wherein either a legal duty or an ethical trade obligation frequently exists to present diverse viewpoints on controversial issues. The mechanics and costs of a mailing do not warrant its utilization by its primogenitor for the presentation of opposing points of view. Instead, in a democratic society, recipients of utility bills are presumed to be aware of the origin of and presuppose a pro-utility message contained within any materials accompanying service bills. Admittedly, these messages are normally self-serving, but this is insufficient to disqualify them from public dissemination. An expert opinion on a matter of concern to at least its originator may be of material interest to other readers. Merely because a message would be offensive to some recipients, it cannot be subdued by fiat. *Carey v. Population Services International,* 431 U.S. 678, 701 (1977).

This Court may have already decided this case in its decision, *Linmark Associates, Inc. v. Willingboro,* 431 U.S. at 95, 98, 96, citing *Virginia Pharmacy Board,* 425 U.S. 772, n.24. There it held "constitutionally infirm," a local ordinance which restricted the flow of "truthful and

legitimate commercial information" so that recipients would not make decisions "inimical" to what their local government had decided was in the individual citizen's best interest. Herein, the Public Service Commission has assumed the responsibility for determining self-interest of utility customers and has barred them from receiving information, accompanying bills, concerning issues which the former determines to be controversial.

In *Willingboro*, as in the instant case, the availability of alternative means of communication was not disregarded, but insufficient to rationalize restrictions on the "free flow" of data. 431 U.S. at 92. Justice Marshall noted that the available alternative means of communication restricted the autonomy of the sender, were not likely to be regarded by persons who were not specifically seeking such information, and were generally less effective. In this case, they are also immeasurably more expensive.

Willingboro, a sign case, was a philosophical descendent of *Thornhill v. Alabama*, 310 U.S. 88 (1940), a picketing case. This Court justified in *Thornhill* the self-serving nature of information transmitted by reference to the needs of society to receive information to make its members able to cope with the "exigencies" of their period. "Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group of society." 310 U.S. at 102, 104. The group in power, however well meaning, may not abrogate freedom of discussion by accepting the ability to determine what is and what is not controversial and the ability to restrict the receipt of the former.

If the appellant's message deals with a subject which the Public Service Commission considers noncontroversial, defined only by example, it may be transmitted within the billing envelope. This presumes that all readers will have the same definition of controversy and more significantly that the composition of the Public Service Commission is eternal, and its appointed membership will continue to

consistently define noncontroversial and controversial matters of public policy. It would not be wildly speculative to imagine that the composition of a successor commission which could redefine these terms with reference to "its own idiosyncratic conception of the public interest" and discriminate among messages in a manner never anticipated by the 1977 incumbents responsible for the current promulgation. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 395 (1969). Even the New York Supreme Court, Appellate Division, justified its decision to permit censorship in part by the assumption that the appellee and the utility companies would be "capable of distinguishing useful information . . . from management's statement on the political issues of the day." (Appellant's Appendix B at 19a). A demonstration that reasonable men have commenced embroidering the definition of controversial and facilely assumed that there will not be disagreement among opposing sides, thereby alleviating the necessity of determining the nature, controversial or not, of each proposed message. It is the contention of the *amici* that the exercise of First Amendment rights should not be subjected to the vagaries of an administrator's conscience.

"[F]irst Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). Narrow specificity is precisely what was evaded by appellee when it defined the regulation in terms of controversy. The commission has unfortunately fallen into the morass anticipated by Justice Harlan in *Cohen v. California*, 403 U.S. 15, 21 (1971). "The ability of government" to circumscribe "discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." If not, a majority is "effectively empower[ed] . . . to silence dissidents simply as a matter of personal predilections." In the instant matter, this is compounded as no advance notice of the personal predilections

of Commission members both today and in years to come is available. The Commission has tacitly encouraged itself to administer a series of *ad hoc* decisions defining the meaning of controversy which effectively empowers it to silence dissidents. No penalty for Commission inconsistencies nor prior warning of intentions is mandated under the objectionable regulation.

"The general test of vagueness" adopted by this Court in 1926, quoted with approval in *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976), must be applied "with particular force on review of laws dealing with speech." This administrative restriction must fail as "men of common intelligence must necessarily guess at its meaning." *Connally v. General Construction Co.*, 296 U.S. 385, 391. Because controversial is defined as "a discussion marked especially by the expression of opposing views," the management of the appellants, presumably possessed of at least common intelligence, faces a dilemma. *Webster's New Collegiate Dictionary*, 245. It must elect between guessing at the essence of a mailing after it is too late to withdraw it from circulation, and receiving appropriate sanctions, or submitting the contents of proposed insert to the Commission which may impose a prior restraint upon its circulation via billing envelopes.

Although in circumstances factually diverse from the instant matter, Justice Burger's opinion, in *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976), noted the especially damaging imposition of "prior restraint . . . upon the communication of news and commentary on current events." In the instant case, the plain meaning of the phrase, "controversial matters of public policy," is centrally located within the ambit of current events. The resolution of present energy crises is obviously controversial and the appellant's available expertise should be accessible for consideration by consumers, many of which may wish to increase their knowledge in this effortless manner. The present prohibition will not permit the receipt of this information via the appellant's least burdensome means. Therefore, there is some doubt that it will ever be brought to the consumer's attention.

In *Cohen*, a disturbing the peace ordinance was held impermissibly used to restrict an objectionable communication, obscene language on Cohen's jacket. Justice Harlan's opinion noted at the outset that the substance of message conveyed could not be prohibited however distasteful to some, if not all, readers. The controversy was regarded, as it should be herein, as arising over the use of a broad language restriction as a "convenient guise for banning the expression of unpopular views." This Court appropriately noted that the social value of the message is not the factor upon which the debate should transpire for it is one of the "prerogatives of American citizenship" to "speak foolishly" as well as knowledgeably. 403 U.S. at 26, citing *Baumgartner v. United States*, 322 U.S. 665, 673, 674 (1944). It is not the prerogative of an administrative agency with presumed expertise centered upon rate regulation and closely related duties, admittedly including billing formats, to voluntarily assume a responsibility not even permitted to be exercised by a state under a legislature's enactment. See also, *First National Bank of Boston v. Bellotti*, 435 U.S. 765.

If the PSC had restricted the utility company's freedom to include any message in the billing envelope, this Court would be faced with determining the constitutionality of a time place and manner restriction which it has occasionally sustained. *Buckley v. Valeo*, 424 U.S. at 18. Its inquiry would center on the reasonableness of preventing such intrusions into the private life of citizens. However, "when the government, acting as a censor, undertakes selectively to shield the public from some kinds of speech on the grounds that they are more offensive than others, the First Amendment strictly limits its power." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975). Such restrictions must survive "rigorous" application of "constitutional standards" and demonstrate precise "drafting and clarity." 422 U.S. at 217.

A controversial matter of public policy standard does not meet this criteria, as "one man's vulgarity is another's lyric." *Cohen*, 403 U.S. at 25. This summation of the philosophical foundation of the First Amendment appropriately resolves this issue. No threat to life, privacy, or liberty of citizens is encouraged by the inclusion of a message with a utility bill and content-based restrictions on its dissemination are not warranted. Realistically, the impact of mail messages is at the discretion of the addressee who may decline to read it and place it in a convenient receptacle accompanied by the discarded envelope in which it arrived. *Lamont v. Commissioner of Motor Vehicles*, 269 F. Supp. 880, 883 (D.C. N.Y. 1967) *aff'd.* 386 F. 2d 449 (2d Cir. 1967) *cert. denied* 391 U.S. 915 (1968). Therefore, this variety of administrative censorship should not be affirmed by the Court.

CONCLUSION

For the reasons stated above, the right of the Public Service Commission to promulgate a regulation denying utility companies the right to place messages concerning "controversial matters of public policy" in billing envelopes should be denied, the decision of the court below reversed and the decision of the New York Supreme Court, Albany County, reinstated.

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Appellee

On Appeal From the Court of Appeals of the State of New York

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Appellant

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee

On Appeal From the Court of Appeals of the State of New York

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

INTEREST OF THE AMICUS CURIAE *

Two terms ago, Mr. Justice Powell, speaking for a majority of the Court, counseled that in the careful delineation of First Amendment rights, the appropriate question is not whether corporations have First Amendment rights, but whether the speech which is to be protected is itself of that type which the First Amendment was intended to protect. *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 776 (1977).

* This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 42.

And, in so holding, the Court reaffirmed that, "a broad conception of the First Amendment is necessary to supply the *public need* for information and education *with respect to the significant issues of the times.*" *Wood* v. *Georgia,* 370 U.S. 375, 388 (1962) (emphasis supplied) (footnote omitted).

The Chamber of Commerce of the United States of America (the Chamber),[1] which had submitted to the Court a brief *amicus curiae* in support of the appellants' position in *Bellotti,* believes that that decision laid to rest the myth that the modern business organization, whether or not incorporated, is *persona non grata* in the "marketplace of ideas" *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 390 (1969), where First Amendment values are both the medium of exchange and the protective source of commerce in political and social thought, belief and ideas.

In the instant case, however, the New York Public Service Commission (NYPSC) and the New York Court of Appeals have, in the view of the Chamber, ridden roughshod over what the Chamber and its members believe to be both the elemental teaching of *Bellotti* and the fundamental concepts embodied in the First Amendment. By labelling NYPSC's prohibition upon the dissemination of billing inserts which discuss "controversial issues" (App. 43a) as "time, place and manner" restrictions (App. 9a), the Court below and the NYPSC would seek to vitiate these important principles. And, by invoking in essence the right of privacy on behalf of the customers of Consolidated Edison (App. 43a, 10a), the Court below and the NYPSC would attempt to create a specious conflict between the First Amendment and the penumbral right of privacy *Griswold* v. *Connecticut,* 381 U.S. 479, 484 (1965), thereby placing that state agency in the position of balancing constitutionally protected rights.

[1] The Chamber of Commerce of the United States is the largest federation of business, trade and professional organizations in the United States. Today, the Chamber has more than 90,000 members, including 86,257 businesses, 1,287 trade and professional organizations and 2,661 local and state chambers.

Thus, no less than in *Bellotti,* the interest of the Chamber and its members in the instant case is rooted in the potential impact of this case as a precedent which will determine their ability to speak freely on issues of vital concern to the Nation, their respective States and localities. The Board of Directors of the Chamber has long recognized that business leaders have the obligations, *inter alia*:

> To guard against unjustifiable restraint, direct or indirect, upon the free and frank expression of opinion on public issues by business and businessmen.
>
> To recognize social as well as economic obligations and to accept the assumption of leadership in meeting the problems and needs of the community.
>
> Policy Declarations Adopted by the Chamber of Commerce of the United States of America (1978 ed.) at 171.

Furthermore, the Chamber includes among its members not only those business organizations which would engage in protected speech, but also those organizations which, in their role of commercial customers, suppliers of goods or services, or members of affiliated or related lines of business, are potential recipients of such pro-

tected communications.[2] And, the Chamber submits, these recipients have a First Amendment right, coextensive with that of the speaker, to receive, evaluate, accept, reject or modify any information or point of veiw.

In sum, the Chamber's interest in the instant case transcends the facts of this case, for, as the Court has previously noted: "Freedom of discussion, if it would fulfill its historie function in this Nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Wood* v. *Georgia,* 370 U.S. 375, 388 (1962).

ARGUMENT

I.

Over the past decade, "institutional advertising" by business organizations, in which significant public policy issues are discussed, at the business' expense, in the print and electronic media, has experienced a substantial growth and has become a commonplace occurrence. *See, e.g.,* S.P. Sethi, Advocacy Advertising and Large Corporations 15-17 (1977). Indeed, payroll stuffers (messages included in pay envelopes), special slide presentations directed to employees, shareholders and customers on public affairs issues, and billing inserts, such as those which are at issue in the present case, are

[2] The Chamber notes that although the facts of the instant case are restricted to proposed communications from Consolidated Edison to its customers, the prohibition of the NYPSC presumably would have applied with equal effectiveness had Consolidated Edison also proposed, for example, to include such communications with the checks it mails out when it pays its bills to its suppliers.

all being utilized by businesses to express their respective viewpoint on matters of pressing concern, at the national, state or local level. *See, generally,* Contact: A Directory of Interpreting Business/Economic Education Programs (Chamber of Commerce of the United States 1978).

This activity is the natural and inevitable result of the evolution of the modern business organization, especially the modern business corporation. As Mr. Justice Jackson observed thirty-seven years ago:

> Whether for good or ill, the stubborn fact is that in our present system the corporation carries on the bulk of production and transportation, is the chief employer of both labor and capital, pays a large part of our taxes, and is an economic institution of such magnitude and importance that there is no present substitute for it except the state itself. *Tax Commission* v. *Aldrich,* 316 U.S. 174, 192 (1942) (Jackson, J., dissenting).

The Chamber would hasten to note that this phenomenon, albeit of relatively recent vintage, is not limited to a handful of large corporations. Rather, business organizations, like all social institutions, vary in size and complexity from multinational enterprises whose stock is publicly held and traded to medium size public companies and to those that are closely held and controlled by an individual or family. And, it cannot be gainsaid that they are not homogenous, for, like individuals and groups, business organizations do not possess monolithic views on issues of concern to the public at large. *Accord, First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 785 n.22 (1977). Indeed, in a socio-political economy in which government regulation is itself such an integral part of each of our lives, the

outcome of virtually every public policy debate, either directly or indirectly, touches no less upon the well-being of business enterprises than it does upon each of us personally, whether the issue is the taxation of personal income, as in *Bellotti, supra,* or the availability of future energy supplies and the role of nuclear power, if any, as a source for our energy needs.

It is precisely because modern business organizations have evolved into social institutions which are so intimately interwoven into the American socio-economic-political fabric that they have increased their involvement in recent years in the public affairs arena. In the view of the Chamber this result has come about for two reasons: first, in partial fulfillment of management's responsibility to the owners of the business to husband and protect the assets of the enterprise; and, second, in partial fulfillment of business' responsibility to contribute whatever special expertise it may possess to to an informed public debate on issues of concern to society.

It is, of course, elementary that a primary legal responsibility of management is to act in the best interests of the owners of the capital which they are employed to safeguard and increase. And, whether failure to discharge that legal responsibility is termed "corporate waste", "breach of fiduciary duty" or "gross neglect and mismanagement", traditional legal remedies are available to owners when management has failed to fulfill its obligations.

In the public affairs context, the Chamber submits, management has no less a responsibility to speak out on behalf of the owners on matters which touch the interests of business. Indeed, one member of this Court has stated the obligation of management thusly:

> The day is long past when the chief executive officer of a major corporation discharges his responsibility by maintaining a satisfactory growth of profits, with due regard to the corporation's public and social responsibilities. If our system is to survive, top management must be equally concerned with protecting and preserving the [private enterprise] system itself. This involves far more than an increased emphasis on "public relations" or "governmental affairs"—two areas in which corporations long have invested substantial sums. L. Powell, "Attack on American Free Enterprise System" Confidential Memorandum to Mr. Eugene B. Sydnor, Jr. Chairman, Education Committee, U.S. Chamber of Commerce, Aug. 23, 1971 (reprinted in Washington Report) at 3.[3]

The Chamber would respectfully suggest that Mr. Justice Powell's comments apply with equal vigor to every business person, regardless of the size or form of organization of the enterprise which that person helps to direct. And, although failure to participate in the public affairs decision-making process does not create a legal cause of action capable of judicial resolution, the Chamber does suggest that those basic principles of business law alluded to above do give legitimacy to business' involvement in public policy debate.

Moreover, the evolution of the modern business enterprise has given rise to the recognition of business' responsibilities to the society in which business functions and from which it draws sustenance. *See,* D. Linowes, "The Corporate Social Audit," in Social Re-

[3] Mr. Justice Powell's comments, of course, predated his nomination to the Supreme Court.

sponsibility and Accountability 93 (1975); K. Davis and R. Blomstrom, Business Society and Environment: Social Power and Social Response 413 (3rd ed. 1975); C. Madden, Clash of Culture: Management in an Age of Changing Values 74 (1972); *see also,* L. Powell, *supra* at 7.

In order to fulfill these responsibilities, business must be able to communicate freely and effectively with the citizenry at large:

> Freedom of the press and other mass communications is not an end in itself but it is a means to an end of a free society. Obviously, mass communication is not set up simply for the profit of business. Business's social role is to provide the people a valuable service which helps maintain their freedoms. Davis and Blomstrom, *supra* at 413.

And, for such communication to be meaningful, other business enterprises, as part of the citizenry at large, must also be free to receive those communications, so that they may be evaluated, accepted, rejected or modified.

II.

We come then to the specific prohibition of the NYPSC, ratified by the New York Court of Appeals below, which offends traditional First Amendment values and would create a specious barrier to communication in the guise of the "right of privacy."

At the outset, it must be noted that the communication at issue here is no different than that which would be made by any other profit-making enterprise. The issue in this case is not whether the cost of the billing inserts will be factored into rate base calculations. To

the contrary, the appellant has already agreed that, in this instance, the cost should be borne by the shareholders of the company. Juris. Statement at 10. As a result, the propriety of this prohibition as a restriction imposed upon a regulated industry need never be addressed.[4]

Second, the Chamber notes that the court below would sanction this prohibition as a mere restriction on the "time, place and manner" of the communication, arguing that the prohibition is "content neutral." App. 9a-11a. With respect to this argument, the Chamber defers to and joins with the arguments advanced by the appellant, except to emphasize that, regardless of the characterization of the prohibition, it must be found to be unconstitutional if its affect is to so impair the ability of the parties to engage in meaningful communication that the core purpose of the First Amendment guarantee is rendered meaningless. And, in this regard, the Chamber notes with great concern the apparent failure of the court below to consider as material the apparently incontroverted evidence submitted by appellant that, "[I]t lacks ample alternative channels for the communication of this information, because other means of communication involve more cost, are less likely to reach Con Edison's customers, and may be less effective (R. 112-15)." Juris. Statement at 6.

What is left, then, is the rationalization of the NYPSC that the prohibition is necessary, because of the appellee's belief that, "using bill inserts to proclaim a utility's viewpoint on controversial issues (even when the stockholder pays for it in full) is tantamount to

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[4] Consequently, the Chamber expresses no view on the constitutional implications of that question.

taking advantage of a captive audience, since the consumer cannot avoid receiving the literature with the utility's message. Regardless of whether consumers read the material, it is basically unfair to subject ratepayers who disagree with the utility's viewpoint to the arguments of the utility through its billing mechanism." App. at 43a. The court below, in turn, characterizes this belief as a desire by the NYPSC "to vindicate the privacy rights of utility customers." App. at 9a.

In conjuring up this justification, however, the court below has attempted to create a false conflict between the First Amendment and the constitutionally protected privacy rights of individuals, for, as will be shown below, the right of privacy is limited to "only personal rights, that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.'" *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49, 65 (1973) *quoting Palko* v. *Connecticut,* 302 U.S. 319, 325 (1937). *See also, Roe* v. *Wade,* 410 U.S. 113, 152 (1973). The receipt of unsolicited billing inserts by customers of Con Edison, cannot, in good faith, be considered a violation of such a fundamental right.

III.

Historically, the right of privacy is rooted in the Bill of Rights, specifically, in "penumbras" emanting from those guarantees. In *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), this Court stated:

> "Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one . . . The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without

> the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'" *Id.* at 484.

In recognizing a right of privacy, this Court has acknowledged that a broad interpretation of such a right could "effectively empower a majority to silence dissidents simply as a matter of personal predilections." *Cohen* v. *California,* 403 U.S. 15, 21 (1971). Accordingly, the right of privacy has traditionally been limited to a narrow range of privileges.

For example, the right of privacy has been found to protect the "personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing." *Paris Adult Theatre I, supra* at 65. *See also, Roe* v. *Wade,* 410 U.S. 113 (1973), *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972), *Stanley* v. *Georgia,* 394 U.S. 557 (1969), *Loving* v. *Virginia,* 388 U.S. 1 (1967), *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), *Prince* v. *Massachusetts,* 321 U.S. 158 (1944), *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942). In addition, the right has been extended to "shield intimate and personal characteristics and activities from public gaze," to protect against "such disparate abuses of privacy as the *unreasonable* seeking, gathering, storing, sharing and disseminating of information by humans and machines," and to "[proscribe against] dehumanizing conduct

which assaults 'liberty, personality and self respect.' " *Galella* v. *Onassis,* 353 F.Supp. 196, 232 (S.D.N.Y. 1972), *modified on appeal,* 487 F.2d 986 (2d Cir. 1973) (emphasis supplied). *See also,* Fried, Privacy, 77 YALE L.J. 475, 485 (1968). Furthermore, any intrusion into the home which constitutes an invasion of privacy must be something which is "offensive or objectionable to a reasonable man." Prosser, Law of Torts 808 (4th ed. 1971).

In this case, there has been no intrusion into the "personal intimacies" of the home which a reasonable man would find offensive. As appellant stated in its Jurisdictional Statement:

> ". . . bill inserts are possibly the least intrusive means of communication. They are much less intrusive than doorbell ringing and door-to-door communication . . . or communication by telephone. The homeowner may pick up the mail at his convenience and may dispose of unwanted messages at will." Juris. Statement at 26.

Similarly, in *Lamont* v. *Commissioner of Motor Vehicles,* 269 F.Supp. 880 (S.D.N.Y. 1967) *aff'd* 386 F.2d 449 (2d Cir. 1967) (mem.), the New York District Court stated:

> "The mail box, however noxious its advertising contents often seem to judges as well as other people, is hardly the kind of enclave that requires constitutional defense to protect the 'privacies of life.' The short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned." *Lamont, supra* at 883.

Furthermore, although some individuals may disagree with the material printed in the inserts, it cannot

be argued that this material is offensive in the sense that this Court has defined the term. For, "much that we encounter offends our esthetic, if not our political and moral, sensibilities." *Erznoznick* v. *City of Jacksonville,* 422 U.S. 205, 210 (1975). And, it is settled that the public expression of ideas may not be prohibited merely because the ideas themselves may be offensive or annoying to some hearers. *Coates* v. *City of Cincinnati,* 402 U.S. 611 (1971), *Street* v. *New York,* 394 U.S. 576 (1969), *Wiegand* v. *Seaver,* 504 F.2d 303 (5th Cir. 1974), *appeal dismissed* 421 U.S. 924 (1975), *Waters* v. *Peterson,* 495 F.2d 91 (D.C. Cir. 1973). It is only where the speaker seeks to "force public confrontation with the potentially offensive aspects of the work," that proscription of speech may become appropriate. *Ginzburg* v. *United States,* 383 U.S. 463, 470 (1966). And, it may not be the content of the speech, as much as the deliberate "verbal [or visual] assault" of the speech which justifies its proscription. *Redrup* v. *New York,* 386 U.S. 767, 769 (1967). *See also, Erznoznick* v. *City of Jacksonville, supra,* at 210, n. 6.

At most, a customer discovering a bill insert may feel annoyance, directed either at the contents of the insert or at Con Edison itself. This annoyance, when viewed in the First Amendment context of the "uninhibited marketplace of ideas," *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 390 (1969), cannot constitute a violation of the narrowly drawn right to privacy which this Court has recognized. It is indisputable that "[e]xposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of

speech and of press." *Time, Inc.* v. *Hill,* 385 U.S. 374, 388 (1967).

No matter how unpleasant we may find the ideas and presence of others, they cannot be avoided:

> 'It might be a lovely world if we could always go about our business without interference, but such a world is likely to be found only by the hermit. Anyone who interacts with other human beings to any significant degree, either within or outside of his home situation, knows that there must be a constant process of accommodation between one's own needs to communicate and the needs of others. We are constantly called upon to interrupt what we may be doing or thinking because someone else wishes to communicate with us. Even though they may be our friends, associates, or loved ones approaching us for perfectly legitimate reasons, there are times when we may find the mere fact of the interruption distracting, inconvenient, annoying, or downright maddening. Of course, those feelings of annoyance are heightened when we feel that the other person has no business approaching us in the first place, or when the content of the message is something we would rather not hear." F.S. Haiman "Speech v. Privacy: Is There A Right Not To Be Spoken To?" 67 Nw.U.L.R. 153, 187 (1972).

Because "virtually every governmental [and private] action interferes with personal privacy to some degree," the question is "whether that interference violates a command of the United States Constitution." *Katz* v. *United States,* 389 U.S. 347, 350 n. 5 (1967). To classify the mailing of bill inserts as a violation of a customer's constitutional right of privacy would stretch that doctrine beyond reason, and would virtually obliterate the First Amendment safeguards against arbitrary and unconstrained proscription of speech.

This questionable relationship between the right of privacy and unsolicited direct mail, whatever its source, has been publicly acknowledged. The Report of the Privacy Protection Study Commission states that:

> "Except for one, none of the witnesses in the Commission's mailing list hearings were willing to acknowledge that privacy issues are involved in direct mail marketing practices at all. Some were willing to admit that unsolicited mail could be a nuisance, an annoyance, or even an abomination—but not a trespass on personal privacy. If an individual does not wish to read his unsolicited mail, they argued, he has an easy option—throw it in the trashcan. Even the United States Postal Service took this view." Personal Privacy in an Information Society 149 (July 1977).[5]

Representative Morris K. Udall has framed the issue as follows:

> "Does unsolicited mail, in and of itself, constitute an invasion of privacy? I say no. My reasons are these: 1) Privacy is a relative right. As long as man lives in a society, he cannot totally divorce himself from its intrusions. His fellowmen must have some way—like the printed 'broadsides and town criers of Colonial America'—to reach him, to prod his conscience. 2) The First Amendment guarantees us the freedom of speech and press. I believe it would be an infringement to say, 'You cannot use the mails to send your message to people who haven't requested it.' 3) If unsolicited mail were an invasion of privacy, our political processes

[5] In fact, statistics of the United States Postal Service show that 42% of all direct mail received is actually considered to be useful information by the recipient and 63% of all direct mail is opened and read. National Consumer Attitude Survey of Advertising Mail, U.S. Postal Service (1972).

would be in jeopardy. 4) Not just advertising matter, but *most* mail is unsolicited and often unwanted—for example: bills, letters from lawyers, tax notices, charity solicitations, calls to jury duty and even some personal letters." M. Udall, "Is Unsolicited Mail an Invasion of Privacy?" American Legion Magazine 37 (Sept. 1970).

In light of this, the First Amendment would suffer a severe setback if the appellant was prohibited from mailing bill inserts because they were found to violate a 'customer's right of privacy. Such a retraction of First Amendment rights cannot be rationalized, as appellee would have this Court do, on grounds that the constitutional intrusion is negligible because alternative methods of communication are available to appellants. As this Court stated in *Boyd* v. *United States,* 116 U.S. 616 (1886):

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Boyd, supra* at 625.

CONCLUSION

For the reasons set forth above, the Chamber, as *amicus curiae,* hereby respectfully requests that the decision of the Court of Appeals of the State of New York be reversed.

Respectfully submitted,

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THE INTERESTS OF AMICUS CURIAE, THE WASHINGTON LEGAL FOUNDATION, INC.

The Washington Legal Foundation, Inc. (WLF) is a non-profit, tax-exempt corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 75,000 members, contributors and supporters throughout the United States whose interests the foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to administrative and constitutional law. WLF seeks to advance the interests of all parties, including businesses, which seek to exercise their First Amendment rights.

The Washington Legal Foundation can bring to this case a perspective not presently represented which may assist in obtaining full consideration of public interest issues. The present parties to this case are concerned primarily with the resolution of this law suit, not with the broader constitutional issues relating to a corporation's right to freedom of speech. Restrictions on the freedom of speech of any group or individual has a severely harmful effect on the functioning of a democratic political system.

The WLF is also concerned with the protection of commercial free speech under the First Amendment. Both business and consumers benefit by the free access to economic information which permits them to make rational decisions in our market economy. Even more importantly, the First Amendment protects speech commenting on economic affairs as well as speech discussing political and social issues.

We believe that it is clearly unconstitutional for a federal or state government agency to deny First Amendment rights to a corporation simply because of its corporate status. The continuing and unchecked aggregation of power by government agencies presents a dangerous threat to the existence of our constitutional freedoms.

ARGUMENT

I.

THE COMMISSION'S BAN ON THE USE OF BILL INSERTS BY THE UTILITY COMPANIES TO EXPRESS THEIR VIEWS ON "CONTROVERSIAL MATTERS OF PUBLIC POLICY" IS A CONTENT-BASED REGULATION, NOT A TIME, PLACE OR MANNER REGULATION AND THEREFORE IS SUBJECT TO A HIGH STANDARD OF REVIEW.

A. Content-based restrictions are those which limit the expression of a viewpoint by one party as opposed to content-neutral restrictions which limit speech only in certain forums or media.

The distinction between content-based restrictions and time, place and manner restrictions is best expressed by Professor Stone:

> Governmental restrictions of expression may be divided into two general categories – content-neutral restrictions and content-based restrictions. Content-neutral restrictions restrict communication without regard to the message conveyed . . . Content-based restrictions on the other hand, restrict communication because of the message conveyed.[1]

Obviously, not all decisions fall into these two categories and many rulings were decided on the basis of unique factual situations. As a general rule, however, content-based restrictions will be held invalid and time, place and manner restrictions (content-neutral) will be viewed by the Court with more favor.

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[1] Stone, *Restrictions on Speech Because of Content: The Peculiar Case of Subject Matter Restrictions,* 46 U. Chi. L. Rev. 81 (1978) (Footnote omitted).

Kovacs v. Cooper[2] is the best example of a strictly content-neutral restriction which bans all speech in a particular forum or media for legitimate reasons. The Supreme Court in *Kovacs* upheld an ordinance banning the use of sound trucks or any vehicle emitting loud and raucous noises within city limits. Similarly in *United States v. Breard*[3] the Court upheld an ordinance banning the distribution of commercial messages by door-to-door delivery. In *Martin v. City of Struthers*[4] however, the Court struck down an ordinance banning all door-to-door distribution of handbills, regardless of content. While the ban was content-neutral, the Court felt that it placed too great a restriction on the ability of certain groups to express their political and religious beliefs.[5]

The Court is rarely confronted with clear-cut examples of content-based or viewpoint-based, restrictions on speech. In one case, *Cohen v. California*[6], the defendant was found guilty of disturbing the peace in displaying an obscene slogan in public on his clothing. The Court struck down the defendant's conviction holding that the state statute restricted speech based on content (i.e. obscenity) and therefore abridged First Amendment rights. *First National Bank of Boston v. Bellotti*[7], discussed below, invalidated a state restriction on the right

[2] 336 U.S. 77 (1949).

[3] 341 U.S. 622 (1951).

[4] 319 U.S. 141 (1943).

[5] For another example of the imprecise standards necessarily used in the resolution of First Amendment cases, *compare Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) upholding a restriction as content-neutral *with Erzoznik v. City of Jacksonville*, 422 U.S. 205 (1975) which struck down a similar restriction.

[6] 403 U.S. 14 (1971).

[7] 435 U.S. 765 (1978).

of a corporation to spend money to influence a referendum since it silenced one viewpoint on a public issue without limiting others.

Police Department of Chicago v. Mosley[8] involved an ordinance prohibiting picketting outside public schools but exempted peaceful picketting in a labor dispute. The Court held this ordinance unconstitutional since it imposed a restriction on speech based on its content rather than, as would be legitimate its mode of expression. Compare *Grayned v. City of Rockford*[9], which upheld a similar statute prohibiting "the making of any noise or diversion which disturbs . . . the peace or good order of such school session . . ." since it was not overbroad and did not discriminate on the basis of the ideas expressed in the picketting.[10]

Many cases fall into a gray area between clearly unconstitutional viewpoint restrictions and innocuous time, place and manner restrictions. Two of these cases, heavily relied upon by the Commission in its brief, involve hybrid subject matter and forum restrictions. *Lehman v. City of Shaker Heights*[11] involved an ordinance forbidding political advertising (subject matter) on municipally operated mass transit (forum). *Greer v. Spock*[12] concerned a military regulation prohibiting political debate (subject matter) on any army training base (forum). Both restrictions were upheld by the Supreme Court due to the important governmental interest involved and the limited

[8] 408 U.S. 92 (1972).

[9] 408 U.S. 104 (1972).

[10] *Id.* at 108.

[11] 418 U.S. 298 (1974).

[12] 424 U.S. 828 (1976).

restriction imposed on freedom of expression. In *Lehman,* the Court recognized that the local government had a legitimate and overriding interest in not offending a captive audience and in avoiding the appearance of bias in allocating advertising space to political candidates.[13] The "historically unquestioned" authority of the military to operate its facilities in a manner necessary to provide for the common defense was held sufficient to sustain the restriction in *Greer.*[14]

B. The Commission's ban on bill inserts is closer to a content-based restruction than to a time, place and manner restruction and therefore constitutes a serious abridgement of a corporation's First Amendment rights.

The Public Service Commission professes to be concerned with protecting consumers from unwanted messages on emotional issues such as nuclear power. Yet there is no difference between the invasion of privacy caused by a utility bill insert and that of any other unsolicited piece of mail which the Commission has no authority to restrict. Since the Commission's ban will not be a content-neutral restriction on the use of a speech forum by all parties, this order cannot qualify as a time place and manner restriction.

The ban on utility bill inserts does however qualify as content oriented or viewpoint restriction on speech. Unlike the *Lehman* and *Greer* cases, the Commission's order does not ban all unsolicited postal communication regarding public issues. The Commission restricts only the views and opinions of public utilities while allowing other

[13] 418 U.S. at 304.

[14] 424 U.S. at 838-39.

participants in political debate unrestricted expression of their views. The Commission's ban is not a restriction on the time, place and manner of expression like *Kovacs*, nor a restriction on the subject matter of speech within a certain forum as was the case in *Lehman*. This case involves a limitation on the ability of one party to express his opinions and is analogous to the statutes struck down in *Cohen* and *Bellotti*. These kinds or restrictions are reviewed much more carefully by the Court and unless an overriding state interest is present they are generally held unconstitutional. But even when dealing with content-based regulations, it is necessary to balance the restriction on freedom of speech against the state interest protected by the regulation to reach a decision.

II.

THE COMMISSION'S BAN ABRIDGES EXPRESSION WHICH THE FIRST AMENDMENT WAS INTENDED TO PROTECT.

The Supreme Court, in three recent cases ruling on First Amendment rights, has recognized that the Constitution protects the right of society to benefit by public expression of ideas and information.[15] Political theorists addressing the issue of freedom of speech support this interpretation of the First Amendment and their views have been incorporated into several opinions.[16] Alexander Meiklejohn, the leading proponent of this position has stated:

> Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with infor-

[15] *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978); *Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85 (1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976).

[16] 435 U.S. at 777, n. 11; 425 U.S. at 765, n.19.

> mation or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.* (emphasis in original)[17]

This view is also supported by Thomas Emerson in *Toward a General Theory of the First Amendment*[18] and John Milton in *Aeropagitica.*[19] The First Amendment is essential to the functioning of democracy since only by protecting the expression of all viewpoints can intelligent political debate and decisions be assured. The views and opinions of corporations have a valid place in public discussions of political issues.

In *First National Bank of Boston v. Bellotti,*[20] the Court recognized that the First Amendment protects primarily the expression of ideas rather than the rights of individuals to make their views known. As the Court said, "The question in this case, simply put, is whether the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protections."[21] Holding that the identity of the speaker was irrelevant, the Court said:

> We thus find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for

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[17] A. Meiklejohn, *Political Freedom* 27 (1960).

[18] T. Emerson, *The System of Freedom of Expression* 6-9 (1970).

[19] J. Milton, *Aeropagitica* (1644) Reprinted in *Aeropagitica and Other Prose Works* 1, 23-38 (1972).

[20] 435 U.S. 765 (1978).

[21] *Id.* at 778.

> the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property.[22]

Like *Bellotti*, there is no reason in this case to suppress the views of petitioners simply because of their corporate status.

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,*[23] the Court held that the First Amendment protected society's right to the free flow of commercial information. The Court also stated, "and if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered."[24] Similarly, in *Linmark Associates, Inc. v. Township of Willingboro,*[25] the Court struck down an ordinance restricting the right of realtors to provide notice of the sale of homes by posting signs, relying on *Virginia Pharmacy.*[26] And as was pointed out in *Bellotti,* cases upholding the right to freedom of the press "emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism and providing a forum for discussion and debate."[27]

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[22] *Id.* at 784.

[23] 425 U.S. 748 (1976).

[24] *Id.* at 765.

[25] 431 U.S. 85 (1977).

[26] *Id.* at 97.

[27] 435 U.S. at 781-83. *See also, Saxbe v. Washington Post Co.,* 417 U.S. 843, 863-64 (1974); *Red Lion Broadcasting Co. v. F.C.C.,* 395 U.S. 367, 389-90 (1969); *Mills v. Alabama,* 384 U.S. 214, 219 (1966); *New York Times Co. v. Sullivan,* 376 U.S. 254, 266 (1964).

These cases establish that the Supreme Court has not limited constitutionally protected expression on the basis of the source of the communication. Nor have limitations been imposed on the means of dissemination or distribution.[28] The Commission's order strikes at the very heart of the First Amendment by its restriction on the right of society to be informed about pressing public issues. The Washington Legal Foundation is not concerned so much with the harm done to the petitioner and other utilities as with the "mutilation of the thinking process of the community"[29] which is inevitable whenever government restricts freedom of speech.

The Supreme Court has applied the *Bellotti* rationale to any government action which limits the right of one individual or group to participate in public debate. Where some parties are prohibited from engaging in political debate then, a fortiori, certain viewpoints will not be expressed and the political system will suffer as a result. While *Police Department of Chicago v. Mosley*[30] is relevant here, more directly on point is *Madison School District v. Wisconsin Employment Relations Commission,*[31] which involved an order by the Wisconsin Employment Relations Commission requiring a school district to deny non-union teachers the right to participate in discussions in order to protect the union's exclusive bargaining right. The Court declared this order unconstitutional, stating, ". . . the participation in public discussion of public business cannot be confined to one category of interested

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[28] See, *Martin v. City of Struthers,* 318 U.S. 141, 143 (1943), *Lovell v. City of Griffin,* 303 U.S. 444, 452 (1938).

[29] Meikeljohn, supra n.17.

[30] 408 U.S. 92 (1972).

[31] 429 U.S. 167 (1976).

[32] *Id.* at 175.

individuals"[32] The bill insert ban has the same effect by limiting the participation in public debate of one group, the utilities, without imposing limits on the expression of others. Such action is, in the words of Chief Justice Burger, "the antithesis of constitutional guarantees."[33]

III.
THE COMMISSION'S BAN DOES NOT FURTHER ANY SIGNIFICANT STATE INTEREST.

In its Statement of Policy on Advertising and Promotional Practices of Public Utilities,[34] the Commission based its ban primarily on the inserts' interference with ratepayer's privacy rights. Viewing the recipients of utility bills as a "captive audience,"[35] the Commission stated, "regardless of whether consumers read the material, it is basically unfair to subject ratepayers who disagree with the utility's viewpoint to arguments of the utility through its billing mechanism."[36] In adopting this position, however, the Commission impermissibly takes upon itself the power to decide which ideas and opinions the consumers of New York will be allowed to see. As the Court stated in *Bellotti,* "in the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak. . ."[37]

Courts have upheld restrictions on freedom of speech only where a substantial privacy interest was involved.[38]

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[33] *Id.* at 175-176.

[34] Appendix E. to Petitioner's Brief and Jurisdiction Statement.

[35] *Public Utilities Commission of the District of Columbia v. Pollak,* 343 U.S. 451, 467 (1952) (Douglas, J., dissenting).

[36] Appendix E at 43a.

[37] 435 U.S. at 784-85.

[38] *Cohen v. California,* 403 U.S. 15, 21 (1971).

The *Pollack* case, which gave birth to the captive audience doctrine, involved a plan of the Public Utilities Commission of the District of Columbia to subject riders of transit vehicles to special commercial radio programs. This proposal was upheld by the Court. Hostile picketting of an individual's home which interferes with his privacy rights may be restricted,[39] but only where the statute is properly drawn.[40]

These cases indicate the sorts of substantial privacy rights which the Court might protect under the captive audience doctrine or other theories. This state interest in the protection of privacy rights, however, does not apply to statements on public issues included with utility bills. The audience remains captive for only as long as it takes to discard the offending announcement. Such a minute intrusion on an individual's right to privacy will not support state action which abridges First Amendment freedoms. This position is supported by the fact that the mailbox is not considered a constitutionally protected enclave.[41] When the right to privacy is balanced against Consolidated Edison's First Amendment rights, as it must be,[42] the Commission's ban on bill inserts must be held unconstitutional.

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[39] *State v. Zanker*, 179 Minn. 355, 356-57, 229 N.W. 311, 312 (1930).

[40] *See, Gregory v. City of Chicago*, 394 U.S. 111, 125-26 (1969) (Black, J., concurring); *see also, Breard v. City of Alexandria* and *Martin v. City of Struthers*, supra, indicating that privacy rights may be superior to commercial expression but probably not to political and religious communication; *see generally*, Haiman, *Speech v. Privacy: Is There A Right Not To Be Spoken To?*, 67 Nw. U.L. Rev. 153 (1972).

[41] *Rowan v. United States Post Office Department*, 397 U.S. 728, 736-37 (1970).

[42] *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977); *Carey v. Population Services International*, 431 U.S. 678 (1977).

The Commission did not base its order on any concern that the ratepayer was being forced to subsidize the utility's views by the inclusion of mailing costs in the expense base on which rates are charged.[43] In any case, respondent's attempt to raise this issue now is without merit. There is no dispute that the cost of the bill inserts will be borne by the stockholders of Consolidated Edison and not by consumers. The argument that petitioner in effect gets a "free ride" on the postage paid for by consumers is spurious since, as Judge Miner pointed out in his opinion, "it is conceded that the cost of mailing would be the same whether or not the inserts were included with the bills."[44] If this had concerned the Commission, the logical solution would have been to allocate part of the cost of the postage on bills to the stockholders rather than imposing an absolute ban on bill inserts.

The ban on bill inserts is especially serious since it effectively precludes communication of the utilities' viewpoint on public issues to consumers. Uncontradicted evidence in the case established that any other means of communication would be more costly and less effective thereby substantially curtailing the utilities' efforts to make known their position on matters of public interest. Since the New York Court of Appeals failed to take into account the unavailability of viable alternatives, its action is clearly contrary to constitutional precedent.[45]

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[43] *See, Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

[44] *Consolidated Edison Company of New York, Inc. v. Public Service Commission*, 93 Misc.2d 313, 314, 402 N.Y.S.2d 551, 552 (1978).

[45] *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 93 (1977).

CONCLUSION

The Public Service Commission's ban on utility bill inserts violates the First Amendment by prohibiting speech which the Constitution was meant to protect. The state's interest in protecting the privacy rights of its citizens does not, in this case, outweigh the abridgement of a constitutional right. The decision of the New York Court of Appeals should be overturned and the Commission's order with respect to bill inserts be declared null and void.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1979.

No. 79-134.

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.,
APPELLANT,

v.

PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK,
APPELLEE.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK.

Motion of New England Legal Foundation for Leave to File Brief as Amicus Curiae, and Brief of Amicus Curiae New England Legal Foundation in Support of Appellant.

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Pursuant to Rule 42 of the Rules of the Supreme Court, New England Legal Foundation moves the Court for leave to file its brief as amicus curiae bound with this motion in support of appellant.

New England Legal Foundation has the consent of counsel for appellant and counsel for appellee to the filing of this brief. Copies of the letters of counsel granting consent are on file with the Clerk of Court.

New England Legal Foundation (NELF) is a non-profit, tax-exempt corporation, organized and existing under the laws of the Commonwealth of Massachusetts for the purpose of engaging in litigation on matters affecting the broad public

interest. Policy for NELF is set by a board of directors composed of New England citizens, the majority of whom are attorneys. The board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community.

New England Legal Foundation participated in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) as counsel for amicus curiae The New England Council, Inc.

The Foundation, due to its unique public interest perspective and established interest in First Amendment issues involving the New England business community, can provide the Court with a more complete argument of the issues in this case.

It is New England Legal Foundation's position that it is patently erroneous to uphold the decision of the Public Utility Commission of the State of New York (Commission) that public utilities do not have the right to disseminate information to the general public concerning the utility's ability to provide energy.

NELF is particularly concerned that the decision of the Court of Appeals of the State of New York will have a chilling effect on freedom of speech. The decision ignores the right of members of the public, including contributors of NELF, to hear the views of utilities on an issue: *i.e.*, energy, which substantially affects every person, corporate and individual, in New England. The effect of the decision of the New York Court of Appeals is to abridge the public's right to hear robust debate on a significant political and economic issue.

At a time when the nation, and New England in particular, is hampered by high energy costs, uncertainty of energy supply, a high unemployment rate and stagnant business development, it is particularly important for the public to hear all points of view on energy issues.

Members of the public are entitled to hear corporate viewpoints so as to have an opportunity to be fully informed. The right to hear uninhibited, wide-open debate, guaranteed by the First Amendment, is severely jeopardized by the Court of Appeals of New York.

For the foregoing reasons New England Legal Foundation respectfully requests permission to participate as amicus curiae and to file the attached brief in support of appellant.

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Brief of Amicus Curiae New England Legal Foundation in Support of Appellant.

Introductory Statement.

New England Legal Foundation, a non-profit corporation, broadly representative of New England interests, files this brief as amicus curiae in support of appellant.

Foremost, the brief discusses the serious infringement of the public's right to hear resulting from the order and decision of the Public Service Commission of the State of New York. The effect of the decision is to chill debate on an issue of great public importance. If the legislative and judicial actions challenged here are allowed to stand, legislatures could restrict the speech of all forms of corporate organizations and regulated industries by merely finding that particular matters involve "controversial" issues.

Public utilities and their consumers are confronted with increasing prices and shortness of supply. The issues facing the utility industry today include fuel shortages, coal conversion and the development of nuclear power to reduce the nation's debilitating dependence on foreign oil. Each of these issues is the subject of debate, not only by the legislative and executive branches of government but also by consumers. It is imperative that government be prohibited from stifling the free flow of information on issues of such importance; otherwise, intelligent self-government will be impossible.

New England Legal Foundation adopts appellant's description of the opinions, the order of the Public Service Commission of New York at issue and appellant's statement of the case.

Questions Presented.

New England Legal Foundation believes that this appeal presents the following issues:

1. Whether the order of the Public Service Commission of New York as upheld by the Court of Appeals of New York infringes upon the right of the public to hear.
2. Whether the Court of Appeals of New York erred in holding that the Commission's bill insert ban is not unconstitutionally vague.
3. Whether the Court of Appeals of New York erred in holding that the Commission's bill insert ban is not a content-based regulation.

Summary of Argument.

Any intrusion upon the right of free expression is so dangerous to full and free debate that this Court should overrule any attempt of state regulatory agencies to limit the right of parties to speak and the right of the public to hear. Particular points made in this brief are:

1. The right to hear free and unrestrained expression on matters of public concern is fundamental to this society. Any restriction upon free expression, however erroneous or disagreeable such expression may be, is abhorrent to the most treasured freedom upon which this country was founded. Even if it were so that the development of nuclear power was not favored by the Public Service Commission, the public has a right to know the position of utility corporations on this subject. If development of nuclear power is in its best interest, the public has a right to know because utility corporations may act upon their beliefs.
2. The standard for the Public Service Commission's ban is incapable of precise definition, vague and impossible to follow.
3. The Public Service Commission's ban is an unconstitutional prohibition against the content of speech. Logical extension of the principle involved in the ban would permit administrative rulings which could stifle free speech by all forms of corporations and regulated industries.

Argument.

I. The Right to Receive Information.

The New York State Court of Appeals in its decision upholding the order of appellee, Public Service Commission of

New York, failed to consider the right of the public to receive the information which would be enclosed in the appellant Consolidated Edison's bill inserts. See Appendix A, Appellant's Jurisdictional Statement (AJS).[1] It is well established that the First Amendment confers the right to receive information as well as the right to communicate. "The right of freedom of speech and press includes ... the right to receive, the right to read ...." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

The Supreme Court reaffirmed this basic concept in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), in which the right of the public to receive advertising concerning the price of prescription drugs was affirmed. This Court stated:

> Freedom of speech presupposes a willing speaker. But when a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both. This is clear from the decided cases. 425 U.S. at 756.

The Supreme Court has explicitly recognized that the First Amendment includes the right to receive information in a broad variety of contexts.[2] In *New York Times Co. v. Sul-*

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[1] This case was instituted by a complaint filed with the Public Service Commission of New York by Natural Resources Defense Council, Inc. (NRDC) objecting to a Consolidated Edison bill insert discussing the need for nuclear power. NRDC is a non-profit organization whose purposes include conserving natural resources. NRDC has been active in fighting nuclear proliferation.

[2] The First Amendment right to know has been recognized in the context of preventing censorship of literature. See, *e.g.*, *Lamont v. Postmaster General*, 381 U.S. 301 (1965), acknowledging the right of the public to receive foreign literature, without the chilling effect of registering with the post office; *Minarcini v. Strongsville City School District*, 541 F. 2d 577 (6th Cir. 1976), preventing the banning of books in high school classes and libraries. See also, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969), where the Court

livan, 376 U.S. 254 (1964), this Court interpreted the First Amendment to include equal protection for a person's right to know as much as for a person's right to speak. And in *Red Lion Broadcasting Co., Inc. v. FCC,* 395 U.S. 367 (1969), this Court, upholding the Federal Communications Commission's fairness doctrine which requires television and radio stations to provide reply time to individuals and organizations disagreeing with their editorials, stated:

> It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. [Citations omitted.] It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. ... It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC. 395 U.S. at 390.

The First Amendment right to know has also been recognized in cases involving political speech. This Court has recognized that "[t]he public interest in having free and unhindered debate on matters of public importance" is "the core value of the Free Speech Clause of the First Amendment." *Pickering v. Board of Education,* 391 U.S. 563, 573 (1968). Similarly in *Garrison v. Louisiana,* 379 U.S. 64 (1964) the Court held:

> [S]peech concerning public affairs is more than self-expression; it is the essence of self government. The

recognized the right to receive obscene films; and *Procunier v. Martinez,* 416 U.S. 396 (1974), recognizing the right of individuals who wish to communicate with prisoners to receive the information contained in the writings of the prisoners.

> First and Fourteenth Amendments embody our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open ...." 379 U.S. at 74-75.

With such cases in mind a district court recently stated: "Free debate on public issues is essential to the survival of the Republic. It hardly needs repeating that such speech should be 'uninhibited, robust and wide-open.' " *Vanasco v. Schwartz,* 401 F. Supp. 87, 97 (S.D. N.Y. 1975), *aff'd,* 423 U.S. 1041 (1976).

This point was again emphasized in the context of political campaigns[3] in *Buckley v. Valeo,* 424 U.S. 1, 14 (1976) where the Court observed that discussion of political affairs is "an area of the most fundamental First Amendment activities," and "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."

The First Amendment guarantee of free speech, including the right to know, is designed to facilitate reasoned, informed self-government in a democratic society. This principle was recently reaffirmed in *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978).

> Moreover, the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and

[3] See also *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978); *Pacific Gas and Electric Company v. Berkeley,* 60 Cal. App. 3d 123, 131 Cal. Rptr. 350 (1976); *C & C Plywood Corp. v. Hanson,* 420 F. Supp. 1254 (D. Mont. 1976), *appeal docketed,* No. 76-3118, 9th Cir. All involved corporate participation on referendum questions.

arguments advanced by appellants, it is a danger contemplated by the Framers of the First Amendment. 435 U.S. at 792.

In *First National Bank of Boston v. Bellotti,* the Court held unconstitutional a Massachusetts statute which prohibited corporations from making expenditures to influence the outcome of referenda, unless such questions "materially" affected the company's property, business or assets. The Court stated that the case involved "... the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation." 435 U.S. at 777.

In *Pickering v. Board of Education,* this Court held that the First Amendment protected the right of a school teacher to express his opinion on the wisdom of approving a bond issue for educational purposes.

> On such a question free and open debate is vital to informed decisionmaking by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal. 391 U.S. at 571-72.

Similarly, appellant here is uniquely informed about the effect of nuclear generated electricity upon the New York ratepayer, and the effect it may have upon business desiring to locate in New York.

The decision by a utility to generate electricity by nuclear power is certainly a matter of concern to ratepayers. The public, including the ratepayers of New York, is intimately affected by the ability of utilities to provide adequate baseload electricity for heat and other necessities. Therefore,

the public has a vital interest in receiving information about how that power will be provided.[4]

The public's right to receive such information exists independent of whether the Public Service Commission decides that a particular issue is "controversial" or "noncontroversial." If utilities believe that the public perception of nuclear power will create a climate adverse to their interests, that belief may affect their ability to expand or even to maintain operations at current levels. The ratepayers are entitled to be informed of the concerns of the utilities in order to make informed, reasoned decisions on public issues.

Even assuming, *arguendo,* that Consolidated Edison's views on the desirability of nuclear power are wrong, there still would be no justification for preventing the public from hearing the utility's point of view. It is not relevant to the First Amendment whether a speaker's views are accurate. In his concurring opinion in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* Mr. Justice Stewart drew a distinction between commercial price and product advertising, as to which factual advertising may be required, and ideological communications as to which accuracy may not be required.

> Ideological expression, be it oral, literary, pictorial, or theatrical, is integrally related to the exposition of thought—thought that may shape our concepts of the whole universe of man. Although such expression may convey factual information relevant to social and in-

[4] For example, electricity in New England is generated principally by oil from foreign sources. In 1973 imported oil accounted for 34% of demand; in 1976 it accounted for 56%. Distillate fuel oil produced from foreign sources accounted for 65% of New England's needs and 71% of its gasoline in 1976. New England River Basins Commission, *New England Dependence on Petroleum Products* (1976). The development of nuclear power could reduce the reliance of New England ratepayers on foreign oil and the cost of energy.

dividual decisionmaking, it is protected by the Constitution, whether or not it contains factual representations and even if it includes inaccurate assertions of fact. Indeed, disregard of the "truth" may be employed to give force to the underlying idea expressed by the speaker. "Under the First Amendment there is no such thing as a false idea," and the only way that ideas can be suppressed is through "the competition of other ideas." 425 U.S. at 779-80.

The decision of the Court of Appeals of New York which seeks to keep the ratepayers ignorant of Consolidated Edison's views on political issues appears to be motivated solely by the fear that the utility's view might be accepted by the public. Such an approach is repugnant to the First Amendment. As the Supreme Court stated in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*:

> There is, of course, an alternative to this highly paternalistic approach. [Preventing pharmacists from advertising the price of prescription drugs.] That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. ... But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. 425 U.S. at 770.

The speech proposed by Consolidated Edison is at the heart of the First Amendment.

> The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. ... Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period. *Thornhill v. Alabama,* 310 U.S. 88, 101-102 (1940).

The public in general has a particular interest about the views of utility companies on the adequacy of energy supply. The fact that utilities operate in a non-competitive market is simply irrelevant. AJS App. A, p. 12a. In these days of rapidly increasing energy prices the free flow of information from Consolidated Edison to its ratepayers could mean the difference between having or not having basic necessities. Without question, inadequate supplies are an exigency of this period.[5]

In *First National Bank of Boston v. Bellotti,* this Court ruled that corporate speech is entitled to First Amendment protection, even when such speech deals with matters *unrelated* to the corporation's business interests. In the free discussion of governmental affairs, the nature of the speaker is not constitutionally significant. The Court noted that

> [t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union or individual. 435 U.S. at 777.

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[5] The New York Court of Appeals underestimates the value of information contained in the bill inserts to informed public decision making: "At best consumers might seek, through the Public Service Commission to limit future increases in electrical prices." AJS App. A, p. 15a. Limiting increases in electrical prices would be no small accomplishment given energy shortages and the fact that electricity is a necessity.

In its bill inserts, Consolidated Edison informs customers of the advantages of nuclear power and of its decision to develop such power. This is an issue intimately related to Consolidated Edison's business. And the information Consolidated Edison seeks to disseminate is "political" in nature: "... speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana,* 379 U.S. at 74-75.

It is clear then, that the debate on nuclear power is precisely the kind of speech that the First Amendment is designed to protect and that Consolidated Edison's right to communicate on this "controversial matter" is entitled to First Amendment protection. Protection of the public's right to hear uninhibited, robust and wide-open debate requires reversal of the decision of the New York State Court of Appeals and a declaration that the ruling of the Public Service Commission, here in issue, is unconstitutional as repugnant to the First Amendment.

II. The Commission's Bill Insert Ban Is Unconstitutionally Vague.

Appellee contends that the Commission's bill insert ban is sufficiently specific to avoid violating the Fourteenth Amendment. Appellee's Motion to Dismiss Appeal or Affirm Judgment Below, 17-19. It is a fundamental principle of Due Process that a statute is unconstitutionally vague if the conduct it prohibits is not clearly defined. *Buckley v. Valeo, supra,* 424 U.S. at 40-41; *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). It is also a fundamental rule of law that "stricter standards of permissible ... vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here,

because the free dissemination of ideas may be the loser." *Smith v. California,* 361 U.S. 147, 151 (1959).

In *Grayned v. City of Rockford,* this Court reviewed the problems created by vaguely drawn statutes:

> ... Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to " 'steer far wider of the unlawful zone' ... than if the boundaries of the forbidden areas were clearly marked." 408 U.S. at 108-109.

As this Court recently stated in *First National Bank of Boston v. Bellotti:*

> In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. 435 U.S. at 784-785.

Thus the constitutionality of the Commission's ban on bill inserts depends upon whether its ruling can withstand the exacting scrutiny necessitated by the restrictions it imposes on freedom of speech. Here, where the prohibition is directed at speech itself, and the speech is intimately related to the pro-

cess of governing, the state may prevail only upon showing a subordinating interest which is compelling. *Bates v. Little Rock,* 361 U.S. 516, 524 (1960); *N.A.A.C.P. v. Button,* 371 U.S. 415, 438-439 (1963).

Further, New York bears the burden of showing the existence of a compelling state interest in regulating the speech at issue, *Elrod v. Burns,* 427 U.S. 347, 362 (1976). And the state must employ means "closely drawn to avoid unnecessary abridgment." *Buckley v. Valeo, supra* at 25.

The Public Service Commission of New York provided absolutely no standards to guide appellant on the use of bill inserts. The Commission's order states:

> . . . [we] . . . order all utilities to discontinue the practice of utilizing bill inserts as a mechanism for the dissemination of a utility's position on controversial matters of public policy. AJS App. F, p. 58a.

The standard imposed, *i.e.,* "controversial matters of public policy" is excessively vague. Its application leads to no discernable result. The pre-publication factual judgment the utility is required to make is incapable of precise definition, and cannot be made with certainty.

The subjective and imprecise nature of the ban is evident in the reasoning of the Commission. The Commission argues that:

> The expression of a utility's views on a controversial issue may truly reflect its concern for the welfare of its consumers and may make a genuine contribution to a public policy debate; but we believe that it is basically unfair to assess against ratepayers the cost of advertisements urging the adoptions of positions with which they may disagree. AJS App. E, p. 42a.

The Commission further states:

> We include in this category expenses designed to influence public opinion in the current debate concerning the development of nuclear power. AJS App. E, p. 43a.

Practical difficulties with the standard abound. First, in the 1950's and 60's, nuclear power was not a "controversial

issue." Its virtues as a cheap, clean, virtually limitless source of power were extolled by utilities, regulators, politicians and the general public alike. Will nuclear power become "non-controversial" if there is another oil embargo?

The New York Supreme Court, Appellate Division[6] also experienced difficulty with the Commission's standard:

> We have little doubt that the PSC and the utilities are capable of distinguishing *useful* information for consumers (e.g., ways to conserve energy) from management's statement on the political issues of the day (e.g., benefits of nuclear power). AJS App. B, p. 19a. (Emphasis added.)

The Appellate Division offers no explanation of why information about the development of nuclear power cannot be both "useful" and "political." Yet considering the effect of the development of nuclear power on the ratepayers such information is clearly useful and considering the extensive national debate on the subject it is clearly political.

In fact the Court substituted an imperfect standard ("useful") for the Commission's already unconstitutionally vague ("controversial") standard. Neither term is immutable; neither provides guidance as to what is permitted and what is not. The Court's standard is not only vague, it is impossible to apply in advance of regulatory and judicial interpretation.

The regulators and the regulated will have to determine on a case by case basis what is "useful" or "non-controversial" information. In each instance, the Commission's decisions as to which issues are controversial will depend upon the Commission's subjective application of an imperfect and im-

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[6] The opinion of the Court of Appeals of New York does not discuss appellant's claim of vagueness but implicitly sustained the Appellate Division in this regard. See AJS, App. A, p. 1a-16a.

precise standard. This is precisely the situation which the First and Fourteenth Amendments are designed to prevent.

Finally, the Commission's ruling as upheld by the Court of Appeals will have, and has had, a chilling effect on speech. The Commission states:

> Thus far, the Commission has only had occasion to consider two issues with respect to its ban . . . the current debate concerning the development of nuclear power and questions concerning the merits of public versus private ownership of electric utilities. In the more than two years since the . . . ban has been in effect, there have been no problems concerning its implementation. Appellee's Motion to Dismiss Appeal or Affirm Judgment Below, p. 17.

The fact that a regulatory agency has experienced no problems imposing censorship on the industry it regulates is hardly surprising. Faced with omitting bill inserts, charging investors for bill inserts or using more expensive means of publicizing its views, Consolidated Edison simply did nothing. The Commission's frontal assault on freedom of speech has resulted in isolating the ratepayer from the single, most important source of relevant information on energy matters, the utility.

The Commission's standard simply cannot withstand the exacting scrutiny required by the First and Fourteenth Amendments. The standard inhibits the exercise of basic First Amendment freedoms and provides no guidance regarding the parameters of the zone of permissible speech.

III. The Commission's Bill Insert Ban Is a Content Related Regulation.

The Commission's ban is a classic example of a content based restriction. Consolidated Edison is permitted to utilize

bill inserts which address conservation and encourage "development" of off-peak loads, which could lessen the country's dependency on foreign oil. AJS App. A, p. 5a. Consolidated Edison is not permitted to discuss nuclear power as a conservation mechanism, despite the fact that increased utilization of nuclear fuel might also lessen the nation's dependency on foreign oil.

In support of its ban on "controversial" matters of public policy on bill inserts the Commission states:

> We realize, too, that a continued ban on promotion of off-peak electric usage may aptly be described as piecemeal conservationism. . . . Nevertheless conservation of energy remains our highest priority. AJS App. E, p. 36a.

This reasoning is constitutionally infirm. Because the Commission has set conservation as a goal, the Commission bans speech making a certain position. In essence, the Commission views discussion of nuclear power as synonomous with a "false," "wrong" or "bad" idea.[7] Any government effort to suppress speech because the government does not agree with the idea communicated, and does not trust the individual recipient to decide wisely, is plainly inconsistent with the First Amendment:

> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford

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[7] See generally, Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject Matter Restrictions*, 46 U. Chi. L. Rev. 81 (1978).

all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone. *Police Department of the City of Chicago v. Mosley,* 408 U.S. 92, 96 (1972).

Where there is regulation of the content of speech there is a "... need for absolute neutrality by the government; its regulation of communication may not be affected by sympathy or hostility for the point of view being expressed by the communicator." *Young v. American Mini Theaters, Inc.,* 427 U.S. 50, 67 (1976).

It is apparent not only that Consolidated Edison and the Commission will (and have) experienced great difficulty in categorizing particular matters as controversial, but also that, in large part, the ultimate determination as to what is controversial is left to special interest groups such as NRDC, Inc. Here the government has acted on the complaint of NRDC, Inc., an avowed anti-nuclear group, to restrict speech about nuclear power. These proceedings were instituted by NRDC, Inc., not the Commission. Thus, the constitutional error is compounded. The Commission not only accepted the viewpoint of one group, it acted to silence opposing views.

The vagueness of the Commission's ruling and its interpretation by the New York Court of Appeals indicates a hostility for Consolidated Edison's views. The regulation does not define speech in terms of time, place and manner but in terms of subject matter.[8] The regulation " '... thus slip[s]

[8] A valid time, place and manner restriction must be content neutral, supported by significant government interest and not foreclose alternate channels of communication. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 771 (1976).

from the neutrality of time, place and circumstance into a concern about content.' " *Police Department of the City of Chicago v. Mosley, supra* at 99. The fundamental underpinnings of the First Amendment are jeopardized by this ill-conceived attempt to isolate ratepayers from the political process.[9] In *Roth v. United States,* 354 U.S. 476, 484 (1957) the Court stated that, "[the Constitutional safeguard] was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

There is simply no factual basis for the assertion that "no one viewpoint is singled out for special treatment ...." AJS App. A, p. 9a. The opposite is true. The Commission's order was spawned by a complaint about the utility's view on nuclear power. Nuclear power is the controversial issue of public importance which is singled out for special treatment. AJS App. 6, p. 25a.

In *Police Department of the City of Chicago v. Mosley,* this Court struck down a city ordinance prohibiting picketing within 150 feet of a school but excepting peaceful picketing of any school involved in a labor dispute, because the ordinance was directed at the content of speech. The Court said: "The operative distinction is the message on a picket sign." 408 U.S. at 95. Similarly, here, the restriction is on the content of speech. "Controversial" messages are banned, "non-contro-

[9] Neither is this a captive audience case. The captive audience doctrine involves coercion: "While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it," *Lehman v. City of Shaker Heights,* 418 U.S. 298, 307 (1974). Here the recipient can discard the bill insert; he is not a captive. See also *Public Utilities Commission v. Pollak,* 343 U.S. 451, 468-69 (1952) (Douglas, J., dissenting opinion), and Black, *He Cannot Choose But Hear: The Plight of the Captive Auditor,* 43 Colum. L. Rev. 960 (1953).

versial" and "useful" messages are permitted. The ban is imposed without regard to time, place or manner. *Kovacs v. Cooper,* 336 U.S. 77 (1949). Restrictions on speech based solely on the content of speech, even if applied in "an objective and evenhanded" manner are nothing more than censorship.

Under this approach the state or an administrative agency may override the First Amendment simply by banning all speech on a hotly debated issue. Any attempt by government to suppress debate usurps the right of the people to make decisions for themselves, distorts the marketplace of ideas and makes intelligent, self-government impossible. The First Amendment is plainly offended.

Conclusion.

The right to think, speak and write freely without government or special interest group censorship is the essence of citizenship. Any form of censorship, under whatever guise presented, reveals a fear that citizens cannot think for themselves, and perhaps more important, that the public may reach a different conclusion than the censor would have it reach.

As Justice Black once stated: "It is not difficult for ingenious minds to think up and contrive ways to escape even the plain prohibitions of the First Amendment."[10] It is evident from the record that this case is one more battleground in the continuing fight for the mind of the citizen. Under pretense of protecting ratepayers from hearing information about the "controversial" subject of nuclear power, the State of New York has prohibited speech on the subject. The issue here is not the development of nuclear power versus conservation, the issue is whether a state regulatory agency may, on the complaint of some citizens, silence debate among all citizens.

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[10] Black, Hugo LaFayette, *A Constitutional Faith* (Alfred A. Knopf, New York 1968).

Protection of political and public expression is fundamental. If one entity is prevented from expressing itself because it is a regulated industry, or because the state disagrees with its view, there is a grave danger that restrictions upon the free expression of ideas may be applied to other entities. Charities may be limited in their expressions to matters which the legislature deems to be within their charitable purposes; special interest groups receiving contributions and conducting their affairs as corporations may be subjected to legislative determinations as to matters upon which they may appropriately speak. The power of the legislature may not be used to silence opposition, to suppress minority viewpoints. The public's right to hear is plainly offended by the power of government to channel the expression of views.

The danger that this case presents to informed decision-making requires a firm pronouncement by this Court upholding the public's First Amendment right to hear wide-open, robust debate so that effective government is not impaired.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY,
Appellant,

-v.-

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF AMICUS CURIAE SUBMITTED ON BEHALF OF THE NATURAL RESOURCES DEFENSE COUNCIL, FRIENDS OF THE EARTH, CONSUMER ACTION NOW, SUSAN MAINWARING AND JOAN McCALL, AS PETITIONERS IN No. 79-595, AND ON BEHALF OF THE CONSUMER FEDERATION OF AMERICA, THE OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, THE UNION OF CONCERNED SCIENTISTS, BROOKLYN ANTI-NUCLEAR GROUP AND THE ENVIRONMENTAL ACTION FOUNDATION

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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY,
Appellant,

-v.-

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF AMICUS CURIAE SUBMITTED ON BEHALF OF THE NATURAL RESOURCES DEFENSE COUNCIL, FRIENDS OF THE EARTH, CONSUMER ACTION NOW, SUSAN MAINWARING AND JOAN McCALL, AS PETITIONERS IN No. 79-595, AND ON BEHALF OF THE CONSUMER FEDERATION OF AMERICA, THE OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, THE UNION OF CONCERNED SCIENTISTS, BROOKLYN ANTI-NUCLEAR GROUP AND THE ENVIRONMENTAL ACTION FOUNDATION

Interest of Amici

Natural Resources Defense Council ("NRDC"),[1] Friends of the Earth ("FOE"),[2] Consumer Action Now ("CAN"),[3] and Susan Mainwaring and Joan McCall[4] are organizations and individuals who, as discussed below, instituted and fully participated in the New York Public Service Commission (hereinafter "the PSC") Rulemaking which resulted in the ban on controversial

[1]Natural Resources Defense Council is a non-profit corporation which is dedicated to the defense and preservation of the human environment and natural resources of this country. NRDC has employed independent technical research and intensive educational campaigns to challenge many assumptions about atomic energy and to reveal some of its serious drawbacks. Many of NRDC's more than 24,000 members have joined the organization to obtain adequate representation and protection for their interests in insuring against unsafe and environmentally hazardous uses of atomic energy. Like FOE and CAN, a number of NRDC's members are customers of Consolidated Edison and Central Hudson, as well as other New York utilities, and have received pro-nuclear bill inserts which they find offensive and with which they strongly disagree.

[2]Friends of the Earth is a non-profit, national organization with a New York chapter numbering approximately 2,200 members. Since its inception in 1969, FOE has been concerned with adverse environmental effects of nuclear energy, and has been engaged in the dissemination of information on nuclear power issues.

[3]Consumer Action Now is a non-profit organization with a constituency of approximately 20,000 persons, which operates primarily as a consumer education and information center. CAN is dedicated to insuring that the general public, as well as its constituents, are fully and fairly informed about a large number of consumer issues, including energy development and safety.

[4]Susan Mainwaring and Joan McCall are individual ratepayors who are customers of Con Ed, and who participated in the New York Public Service Commission Rulemaking which led to the ban challenged in this case.

bill inserts challenged here by Consolidated Edison ("Con Ed").[5]

The Consumer Federation of America ("CFA"),[6] Office of Communication of the United Church of Christ,[7]

[5]All these Amici have been represented in all relevant preliminary proceedings — from the PSC Rulemaking through argument in the United States Court of Appeals — and here, by staff and/or cooperating attorneys with the Media Access Project, a not-for-profit, public-interest law firm specializing in communications law and the dissemination of opposing viewpoints on controversial issues.

[6]Consumer Federation of America is a federation of more than 220 state, local and national organizations, representing more than 30 million consumers, which advocates the consumer viewpoint before government bodies, including Congress and federal agencies. The consumer groups represented by the CFA include, *inter alia*, women, the elderly, blacks, chicanos, and members of other traditionally un- or under-represented interests. CFA member organizations include: The National Council of Senior Citizens; The American Association of Retired Persons-National Retired Teachers Association; National Council of Jewish Women; B'nai B'rith Women; National Ladies Auxiliary, Jewish War Veterans of America; National Board of YWCA; the United Auto Workers; United Steelworkers of America; International Ladies Garment Workers Union; Amalgamated Clothing Workers; Communications Workers of America; and International Union of Electrical, Radio & Machine Workers. In addition, numerous CFA member organizations represent broad-based consumer economic interests and include: Cooperative League of USA; Credit Union National Association; Arizona Consumer Council; Association of Massachusetts Consumers; Cleveland Consumers Action Movement; Consumer Association of West Virginia; D.C. Consumer Affairs Committee of the Americans for Democratic Action; and New York Consumer Council.

[7]The Office of Communication of the United Church of Christ is a national instrumentality of the United Church of Christ, a Protestant denomination with more than two million members in some 7,200 congregations. The Office of Communication is charged by the United Church of Christ constitution to conduct a ministry in mass communications. It has participated in numerous federal and state proceedings, including broadcast and telecommunications common-carrier matters, to enhance the free flow of information and contrasting points of view on issues of public importance.

Union of Concerned Scientists ("UCS"),[8] Brooklyn Anti-Nuclear Group ("BANG"), and the Environmental Action Foundation ("EFA")[9] are groups who are deeply concerned about, and intimately involved in the kinds of consumer, environmental and communications issues raised by the instant appeal.

As more fully set forth in the Statement of the Case which follows, NRDC, *et al.* have been critically important and full participants in every portion of the case before this Court except that, through no fault of their own, they were not parties in the State Court action here reviewed.[10] They, and the additional Amici, represent

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[8]The Union of Concerned Scientists is a non-profit organization based in Cambridge, Massachusetts which is concerned principally with the impact of advanced technology on society. UCS was organized in 1969 as an informal faculty group at The Massachusetts Institute of Technology and has grown into a nationwide organization supported financially by 90,000 concerned citizens. UCS's interest in this case arises from the independent technical studies which it has conducted on nuclear power plant safety, radioactive waste disposal, energy policy alternative, and arms control measures, and dissemination of information on those issues to the public-at-large.

[9]The Brooklyn Anti-Nuclear Group is a community group located in Brooklyn, New York, an area whose electric power is supplied by Con Ed. BANG's objective is the prompt cessation of all nuclear power plants presently in operation and the prompt halt to construction of all new nuclear power plants.

The Environmental Action Foundation is a Washington, D.C.-based citizen information and action organization formed to aid in protection of the world's environment. It has been concerned with matters relating to utility regulation for seven years, and has a Utility Project to effectuate that goal. EAF distributes newsletters, resource materials and other publications throughout the nation, many of which address arguments surrounding the regulation of electric utilities and its effect on consumers and the environment.

[10]They were full party defendants in an identical federal court action, and participated as fully as permitted by law as amici in the state court.

the independent interests of ratepayors and consumers, interests which the PSC has considered and "balanced" in enacting its *Policy Statement*, but interests which it cannot be said to truly represent.[11]

Further, Amici assert independent First Amendment interests which have been recognized by this Court,[12] and which must be balanced against the interests asserted by Con Ed and other utilities.

Finally, NRDC, FOE and CAN were parties to the federal court action challenging the same PSC *Policy Statement*. In that case, they engaged in extensive discovery, resulting in a factual record[13] which will hopefully illumine the otherwise abstract issues presented to this Court in this case.

Statement of the Case

In 1976, acting on complaints from NRDC against Con Ed, the PSC instituted a rulemaking proceeding on the issues of political and other utility advertising, and the use of utility bill inserts for the dissemination of the utility's views on controversial matters of public policy. After many months, and the consideration of hundreds of comments, on February 25, 1977 the PSC issued its *Policy Statement*, followed, on July 14, 1977,

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[11]See *Office of Communications of United Church of Christ v. F.C.C.*, 359 F.2d 990, 1002 (D.C. Cir. 1966).

[12]These are the right to be free from forced subsidy of political ideas with which they disagree, and the right to be free from having objectionable material unavoidably thrust upon them in the privacy of their homes.

[13]LILCO has already lodged a copy of the joint appendix which was filed in the Second Circuit with the Clerk of this Court. Factual assertions contained in this brief are drawn from that brief and will be denominated by the appropriate page number preceded by the letters "JA".

by an Order Denying Petitions for Rehearing ("The *Reconsideration*").[14]

NRDC, FOE and CAN's initial interest in the PSC rulemaking was to obtain "equal time" or shared access to utility bill inserts which had been and were being employed to disseminate pro-nuclear propaganda. However, in adopting the *Policy Statement* here challenged, the Commission declined to adopt the shared access scheme proposed by those Amici.[15] Instead, it banned the use of bill inserts for dissemination of utility company views on all "controversial matters of public policy." Since that decision, NRDC, *et al.* have supported the PSC ban as the "least restrictive means" it could employ, but have continued to argue that if the ban is set aside some shared access scheme is constitutionally compelled.

Following the Commission's *Policy Statement* and *Reconsideration*, the Long Island Lighting Company ("LILCO")[16] commenced an action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Eastern District of New York[17] challenging the ban on contro-

[14]See 31a, *et seq.* (*Policy Statement*) and 59a, *et seq.* (*Reconsideration*). References to the Appendix to the Jurisdictional Statement filed in this case by Con Ed will be denominated by the appropriate page number followed by a lower case "a".

[15]See, *e.g.*, *Reconsideration* at 66a-67a, and separate opinion of Chairman Kahn, at 55a. Commentators have cited the *Rulemaking* here at issue as one in which the shared access concept was considered and rejected. See Note, *Utility Companies & the First Amendment: Regulating the Use of Political Inserts in Utility Bills*, 64 Va. L. Rev. 921, 931 n. 52 (1978) (hereinafter *"Utility Companies & the First Amendment"*).

[16]LILCO filed a petition for certiorari which has been docketed in this Court as 79-629. It has already filed an amicus brief in the instant appeal in support of the position taken by Con Ed.

[17]*Long Island Lighting Company v. New York Public Service Commission*, 77 Civ. 972 (hereinafter "the LILCO case", or "the federal action"). The opinion in that case is printed as an appendix to LILCO's amicus curiae brief.

versial bill inserts as a violation of its First Amendment rights. LILCO also challenged the Commission's ban on advertising electric space heating.[18] NRDC, FOE, CAN, and the individual ratepayors[19] moved to intervene as party-defendants on the bill insert issue. Their motion was granted, and they participated fully in that case, including engaging in extensive discovery which resulted in a full record on factual matters critical to the determination of the First Amendment questions there- and here-presented.[20]

While the *LILCO* case was *sub judice* in the District Court, Con Ed and Central Hudson commenced a state court action challenging the same PSC *Policy Statement*. However, because New York law does not require that participants on PSC rulemakings be notified when the results of those rulemakings are challenged, NRDC, *et al.* were unaware of the state court action until after the time for intervention had passed. Because, through no fault of their own, there was no way to be involved as parties, NRDC, *et al.* participated as amici throughout the state action.

The New York Court of Appeals and the District Court decided their respective, but virtually identical,

[18]NRDC, *et al.* participated only on the bill insert issue, and assert their interest as amici in this case solely on that issue.

[19]One other party, Scientists Institute for Public Information ("SIPI") was an intervenor in the federal court action, but it has been removed as a participant in this action by the consent of all parties. Accordingly, when referring to those groups and individuals who participated in the *Rulemaking* and federal court action, the general term "NRDC, *et al.*" will be employed.

[20]These included the costs to the utility and the ratepayors of the use of bill inserts; the cost and relative efficacy of other means of communicating the utility's views; the utility's need to employ bill inserts based on the history of its use of that means of disseminating its views, etc. The facts found are summarized in the Rule 9(g) statement filed in the District Court by Intervenors, and reproduced in the Joint Appendix at JA 343, *et seq.*

cases within a month of each other.[21] The appellant utilities in the state case appealed directly to this Court[22] while LILCO and the PSC each cross-appealed the District Court's decision to the United States Court of Appeals for the Second Circuit.[23]

After probable jurisdiction was granted in the instant case, and before oral argument was had in the Second Circuit, on October 11, NRDC, *et al.* petitioned this Court for certiorari prior to judgment, and for expedited consideration of the certiorari petition.[24] The *LILCO* case was argued in the Circuit on October 22 and is presently *sub judice*. On October 29 this Court denied NRDC and LILCO's motions for expedited consideration; the petitions for certiorari are still pending.

Questions Presented

1. May the New York Public Service Commission, statutorily mandated to regulate state-franchised utilities to serve the public interest, constitutionally ban the use of the utility billing mechanism for the utility company's views on controversial matters of public policy when, in its expert opinion:

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[21]The District Court decision in *LILCO*, rendered on March 30, 1979, upheld the ban on controversial bill inserts, but struck down the ban on advertising electric space heating. The New York Court of Appeals decided *Con Ed* and *Central Hudson* on May 1, 1979, upholding both of the Commission's bans.

[22]Probable jurisdiction was noted in *Con Ed* on October 1, 1979, and the case was docketed as 79-134. Probable jurisdiction was noted in *Central Hudson* on November 27, 1979 and that case was docketed as 79-565.

[23]The appeals are docketed in the Second Circuit as 79-7374 and 79-7375.

[24]LILCO filed a similar petition and motion on October 12, and the PSC wrote to this Court that it had no opposition to the granting of both petitions. The NRDC petition was docketed as 79-595, and LILCO's petition as 79-629.

(a) such a ban is constitutionally required to prevent unwilling ratepayors from subsidizing political views with which they disagree, and/or

(b) such ban is constitutionally required to protect ratepayors from having offensive material unavoidably thrust upon them in the privacy of their home, and/or

(c) such ban is required to meet the non-discrimination requirements of the state public service law which prohibits favoring one class of ratepayors (*i.e.*, those sharing the utility company's views) over another, and/or

(d) such ban is required to conserve the bill insert mechanism for useful consumer billing and rate information as required by statute, and/or

(e) such ban is required to prevent the billing insert from becoming a public forum, necessitating the Commission's constant intrusive presence in administering a constitutionally required shared access scheme

and, where the ban in no way diminishes the utility's ability to communicate its views on any controversial issue by any means or channel open to any other person, including the United States mails?

2. May the Commission's ban on the use of the billing insert mechanism be upheld as a reasonable time place or manner restriction where:

(a) numerous alternate means for communicating the utility's views remained open, and

(b) numerous substantial governmental *and* countervailing First Amendment interests are served by the ban, and

(c) the speech regulated by the ban was broadly defined by class, viewpoint neutral, and did not even conceivably place the Commission or the State on one side of an issue?

3. Was the ban unconstitutionally vague where the term was familiar, concededly synonymous with the term "political" as used in settled agency practice, and where the agency agreed to give expeditious prior rulings where utilities expressed any doubt as to its applicability?

4. If the Commission's ban is struck down, must the case be remanded to the Commission with instructions to formulate and administer a shared access scheme as required by the First Amendment and as previously proposed to the Commission by Amici below?

ARGUMENT

Summary of Argument

A) The Conceptual Framework

This case does not fall neatly into any of the traditional categories of First Amendment analysis which provide a standard test and a readily discernible result.[25]

[25]There is, of course, some question as to whether there is *any* traditional First Amendment theory presently shared by a majority of the Supreme Court or by leading constitutional scholars. Besides the now familiar, but still complex, debate between the so-called "absolutists" and the "balancers", compare, *e.g.*, Kalven, *Upon Rereading Justice Black on the First Amendment*, 14 UCLA L. Rev. 428 (1967) *with* Gunther, *In Search of Judicial Quality on a Changing Court; The Case of Justice Powell*, 24 Stan. L. Rev. 1001 (1972), *and* Alfrange, *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 Sup. Ct. Rev. 1 *with* Ely, *Flag, Desecration, A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482 (1975); *and see generally* the Mendelson-Franz debate in articles cited in Tribe, *American Constitutional Law*, 582-83 n. 19 (1978) (hereinafter "Tribe"). Professor Tribe has himself entered the fray with his own "two-track" theory of analysis, which divides government actions (and thus the extent of permissible regulation) between those aimed at communicative impact (Track 1) and those aimed at non-communicative impact but nevertheless having adverse effects on communicative opportunity (Track 2). Tribe, *supra*, at p. 580 *et seq.*

Con Ed's brief and LILCO's Amicus Curiae Brief reflect the lack of any familiar conceptual analysis, and indeed impose no real conceptual framework. The New York Court of Appeals opinion, although it employed some traditional concepts,[26] did so in an unfamiliar context.[27]

First Amendment cases, and particularly those decided by this Court, have employed numerous distinctions in reaching their constitutionally compelled conclusions — these have included, to name but a few, public vs. private,[28] commercial vs. non-commercial,[29] press vs. electronic media,[30] symbolic speech vs. "pure" speech,[31] etc. Depending on the categories employed, or the distinctions deemed dispositive,[32] diverse "tests"

[26]We refer here to the use of the "time place or manner" test which is discussed more fully *infra* at Point III.

[27]Bill inserts, clearly do not resemble the parks and streets which have traditionally been seen as public forums, and which have given rise to the "time place or manner" analysis. Point III (A) *infra*. See generally, Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1; Dorsen, Bender and Neuborne, *Political and Civil Rights in the United States*, Vol. I, pp. 442 *et seq.* (4th ed.).

[28]See, for example, the contradictory positions taken in the shopping center cases, *e.g.*, *Amalgamated Food Employees v. Logan Valley Plaza*, 391 US 308 (1968); *Lloyd Corp. v. Tanner*, 407 US 551 (1972); and *Hudgens v. NLRB*, 424 US 507 (1976) which overruled *Logan Valley*. Note also the substantial First Amendment implications of classifying a potential defamation plaintiff as a "public" or "private" figure. Compare *Gertz v. Robert Welch, Inc.*, 418 US 323 (1974) with *Time, Inc. v. Firestone*, 424 US 448 (1976).

[29]The shift in the Court's position and the numerous shades of difference its recent decisions have involved are fully discussed in Roberts, *Toward a General Theory of Commercial Speech & the First Amendment*, 40 Ohio St. L. Rev. 115 (1979) (hereinafter "Roberts").

[30]Compare, *e.g.*, *Miami Herald Publishing Company v. Tornillo*, 418 US 241 (1974) with *Red Lion Broadcasting Co. v. FCC*, 395 US 367 (1969).

[31]Compare the nuances of analysis engendered by these characterizations in *United States v. O'Brien*, 391 US 367 (1968) with *Tinker v. Des Moines School District*, 393 US 503 (1969).

[32]These distinctions may and do vary from case to case.

are employed to reach a result. These may range from requiring a "compelling state interest" for the abridgement of pure speech,[33] to "reasonable time place or manner restrictions" on speech in public forums,[34] or to the so-called *O'Brien* test[35] for regulating "symbolic" speech.

To a greater or lesser degree, all of these cases, however structured, require an inquiry into several critical issues. These are:

1) What purposes or goals of the First Amendment[36] are implicated or lessened by the challenged state action?

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[33]Speech which is "entirely divorced from actually or potentially disruptive conduct...[is] akin to pure speech." *Tinker v. Des Moines School District, supra* at p. 505.

[34]The State may reglate the time, place and manner of speech so long as such regulations are justified without reference to the content of the regulated speech, serve a significant governmental interest, and leave open ample alternative channels for communication of the information. *E.g., Grayned v. City of Rockford*, 408 US 104, 115-117 (1972); *Martin v. Struthers*, 319 US 141 (1943).

[35]The test in *United States v. O'Brien, supra,* applies to speech which contains elements of both speech and non-speech. It is as follows:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. 391 US at 377.

[36]Three major purposes of the First Amendment's guarantee of freedom of speech have been identified. These are:

1) furtherance of an open "marketplace of ideas," -- see, *e.g., Abrams v. United States*, 250 US 616, 630 (1919) (Holmes and Brandeis dissenting); J. Milton, *Areopagitica, A Speech for the Liberty of Unlicensed Printing to the Parliament of England* (1644);

2) furtherance of intelligent, self government in a democratic system, see, *e.g.*, Meiklejohn, *Political Freedom* (1960);

(Footnote continued on next page)

2) If the state action is a restriction or regulation, does such restriction or regulation actually "abridge" speech,[37] and if so, how much?[38]
3) Does the state have substantial, important, or compelling reasons for its action?[39]
4) If so, has it acted as narrowly, or least restrictively as possible?[40]

Another complimentary kind of inquiry is that suggested by Tribe's[41] two-track analysis. One first must ask whether the State's action is aimed at "communi-

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T. Emerson, *The System of Freedom of Expression*, 7 (1970);
A. Bickel, *The Morality of Consent*, 62-63 (1975); and
3) furtherance of the individual's ability of self-expression and thought, see, *e.g., Whitney v. California*, 274 US 357, 375 (1927) (Brandeis and Holmes, J.J., concurring).

[37]As the District of Columbia Circuit has recently noted, "...rules restricting speech do not necessarily abridge freedom of speech." *Home Box Office v. FCC*, 567 F.2d 9 (D.C. Cir. 1977), *cert. den.* 434 US 829 (1977). While it wrote in the context of regulation of broadcast media "to prevent cacophony," the concept is readily transferable to other First Amendment arenas.

[38]This question may also necessarily include an inquiry into the availability of alternate means of communication.

[39]The extent of the State's interest required will, obviously, vary depending upon the degree of interference with the interests protected by the First Amendment; hence, if not a sliding scale, certainly a continuum of qualifications is required.

[40]This question or test is generally phrased in terms of whether the State has used the least restrictive means necessary to accomplish its legitimate purpose, or whether the law or regulation challenged is so narrowly drawn as to take in only the evil sought to be prevented and no more, *e.g., Hynes v. Mayor of Oradell*, 425 US 610, 619 (1976).

[41]Tribe, *American Constitutional Law, supra* at pp. 580-584.

cative"[42] or "non-communicative"[43] impact. If the state means to limit or otherwise effect the communicative impact of speech, it has placed itself on one side of an issue; this is almost always impermissible. If the state's action is aimed at the non-communicative effect of speech, or speech-related conduct, the courts will employ a weighing or balancing of competing interests since

> "...regulatory choices aimed at harms not caused by ideas or information as such are acceptable so long as they do not *unduly* constrict the flow of information and ideas" Tribe, *supra* at pp. 581-82 quoting from *Cox v. New Hampshire*, 312 US 569, 574 (1941).

Almost 30 years ago, in an explication of the process by which this Court must ultimately determine First Amendment issues in individual cases, Justice Frankfurter accurately reflected, and more accurately prophesied,

> "The results in these multifarious cases have been expressed in language looking in two directions. While the Court has emphasized the importance of "free speech," it has recognized that "free speech" is not in itself a touchstone. The Constitution is not unmindful of other important interests, such as public order, if interference with free expression of ideas is not found to be the overbalancing consideration. More important

[42]By this, Tribe means restriction, regulation or prohibition of speech *because of* the ideas it expresses; see, *e.g.*, the discussion of sedition laws in *NY Times v. Sullivan*, 376 US 254, 276 (1964), or because of the *consequences* which may flow from its receipt, see, *e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 US 748 (1976).

[43]Here he means that "without aiming at ideas or information in either of the above senses, government can constrict the flow of information and ideas while pursuing other goals, either (a) by limiting an activity through which information and ideas might be conveyed, or (b) by enforcing rules compliance with which might discourage the communication of ideas or information." Tribe, *supra* at p. 580. This analysis would support the state interests in protecting privacy and avoiding forced subsidy discussed at Points I (B) and (A) *infra*.

> than the phrasing of the opinions are the questions on which the decisions appear to have turned." *Niemotko v. Maryland*, 340 US 268, 282 (1951).

B) Summary of Amici's Arguments

Whatever "balancing" or "accommodation of interests" the First Amendment requires in this case can only be achieved by asking the relevant questions[44] and by then answering them from facts in the record below.[45] To aid the Court in this inquiry, Amici will first address themselves to the general questions

1) What legitimate state interests did the Commission seek to further by its ban on bill inserts of "controversial issues of policy?" and
2) What is the actual effect of the ban on a utility's ability to speak on these issues, and on the public debate which encompasses them?[46]

In answering these questions, Amici will suggest the legal conclusions which inevitably flow from those

[44]See *Young v. American Mini-Theatres*, 427 US 50, 76 (1975) (Powell, J., concurring):

> "The unique situation presented by this ordinance calls, as cases in this area so often do, for a careful inquiry into the competing concerns of the State and the interests protected by the guarantee of free expression."

[45]This Court has always properly insisted on a proper record for making decisions based on First Amendment claims. Unfortunately, the *Con Ed* case in the New York courts was decided essentially on the pleadings. In the *LILCO* federal action, in which Amici NRDC, FOE and CAN were Intervenors/Defendants, extensive discovery resulted in a number of uncontroverted facts which may be helpful to this Court in determining the otherwise somewhat abstract questions presented here. Accordingly, reference to uncontroverted facts in the *LILCO* case will be made where relevant.

[46]Question 1 here roughly corresponds to Question 3, posed earlier on p. 13; Question 2 corresponds to Questions 1-2 on pp. 12-13; and the "legal conclusions" to Question 4 on p. 13.

answers; *i.e.*, that *none* of the interests protected by the First Amendment is threatened or damaged by the Commission's action, that the Commission's action has neither "suppressed" ideas nor placed the state on any side of a controversy[47] and that its action not only furthers substantial or compelling state interests, but does so by the least restrictive means available to it.

Amici will also discuss the New York Court of Appeals opinion, arguing that its use of the "time, place or manner" test is simply another way of making the necessary inquiry described above.[48]

Finally, Amici will argue that if the absolute restriction on use of bill inserts for controversial material is not the least restrictive means of achieving the State's legitimate and substantial interests, the bill inserts must constitutionally be seen as at least a limited public forum requiring access and "equal time" for dissenting views.[49]

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[47]See Point II, *infra*.

[48]In reconciling the general inquiry and the more formal test, conceptual difficulties concerning "public forum" and "content neutral" are, we believe, effectively eliminated. See discussion at Point III, *infra*.

[49]See discussion at Point V, *infra*.

POINT I

THE FIRST AMENDMENT INTERESTS OF INTERVENORS AND OTHER RATEPAYORS COMPEL, AND A NUMBER OF STRONG AND SUBSTANTIAL STATE INTERESTS REQUIRE, THE BAN ADOPTED BY THE COMMISSION.

Introduction

The Commission, the New York Court of Appeals and the District Court discussed five separate interests[50] in support of the Commission's bill insert ban. These were:

a) protection of ratepayors against compelled subsidy of political views with which they disagree;[51] and

b) protection of ratepayors against having offensive material unavoidably thrust on them in the privacy of their homes; and

c) compliance with non-discrimination provisions of the State Public Service Law; and

d) preservation of the limited resource for its primary, statutorily mandated purpose of providing consumer, billing and rate information; and

e) preventing the bill insert mechanism from becoming a "public forum," thus involving the Commission in constant, administratively difficult and unnecessarily intrusive monitoring

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[50]These interests will be discussed, *seriatim*, at Subpoints A-E of this Point I. The Commission recognized all five interests; the New York Court of Appeals relied primarily on the privacy issue (b), and the District Court omitted only the subsidy issue (a).

[51]Neither the New York Court of Appeals nor the District Court reached this issue, although the PSC quite clearly and correctly did. See 42a, 67a, fn. 1.

of an access scheme mandated by the First Amendment.[52]

Amici agree that, separately or together, these constitute important, substantial or compelling "state interests" which are more than sufficient to sustain the Commission's ban. However, Amici also represent real ratepayors who assert their own individual, independent First Amendment rights,[53] rights which conflict with those alleged by the utilities. As we argue below, the First Amendment rights of the ratepayors clearly outweigh the utilities' alleged rights and not only support but independently compel the ban adopted by the Commission and affirmed by the New York Court of Appeals and the District Court.

A) Avoidance of a Forced Subsidy by Ratepayors

Utilities are state-created monopolies. Gas and electric customers have no choice but to buy from the utility which the state has franchised to serve their area. Because there is no competition in the traditional sense, and because of the enormous economic benefit given the utility by virtue of its monopoly position, the state can and must regulate the rates charged by utilities to insure that they reflect only the costs of providing necessary services to their customers.[54]

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[52]The Commission expressed the sense that an absolute ban was administratively necessary as a lesser intrusion in protected First Amendment areas, see 66a-67a.

[53]These are the rights to be free from forced subsidy and from unavoidable intrusion of offensive material into their homes, described as (a) and (b) above.

[54]The state, in regulating rates, must also provide a reasonable rate of return to utility shareholders; this is required to insure sufficient capital formation for the utility to engage in necessary construction and expansion. However, because of the monopoly position conferred upon utilities, this Court has held that a public utility is entitled to a return commensurate with earnings of firms that face similar risks, but that a regulated firm has "no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures." *Bluefield Waterworks & Improvement Co. v. Public Service Commission*, 262 US 679, 692-93 (1923).

This special relationship between utilities and their customers is one important substantial basis for the ban on controversial bill inserts. In enacting the ban, the Commission expressed the long-established principle that

> "...it is wrong to expect ratepayors to finance [utility company] participation [in political propaganda]." (43a)

The reason for this, of course, is that ratepayors derive no service-related benefits[55] from the company's political advertising.[56] The purpose of such advertising is to benefit the utility's shareholders,[57] and under

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[55]This view has been clearly articulated by the Federal Power Commission, *Alabama Power Company*, 24 FPC 278, 286 (1960), *aff'd sub nom., Southwestern Electric Power v. FPC*, 304 F.2d 29 (5th Cir. 1962). The Commission has similarly viewed the lack of direct service benefits as a ground for excluding the costs of political advertising from the rate base. See, *e.g., Policy Statement* at 41a-42a; *Reconsideration* at 60a. Significantly, it has recognized that certain other kinds of advertising, *e.g.*,

> "appeals for the conservation of gas or electricity; notification of emergency conditions and procedures; instructions in the proper use of the equipment which makes use of the utility's service; information about new rates; new billing practices..."

in fact benefit ratepayors, and so are chargeable to them. *Policy Statement* at 43a.

[56]There is no question that pro-nuclear bill inserts constitute "political advertising." Ads which emphasize the importance of nuclear power plants and which urge their timely building have been held by the FPC to be political advertising which must be classified as a non-operating expense. Letter from L.H. Drennan, Jr., FPC Chief Accountant, to the Hon. Philip A. Hart, Chairman, U.S. Senate Subcommittee on the Environment, Senate Subcommittee on Commerce, October 30, 1974. See also, *Public Media Center v. FCC*, 587 F.2d 1322 (D.C. Cir. 1978).

[57]See, *e.g., Policy Statement* at 41a-42a; *Southwestern Electric Power Co. v. FPC, supra* at p. 41.

standard state and federal utility accounting practice, it is they who must pay the cost of such advertising.[58]

This axiom of utility rate regulation also stands on a firm constitutional base, recognized by the Commission. The First Amendment clearly protects individuals from any compulsion to support political views with which they disagree,[59] whether such compelled support be expressive, see *Wooley v. Maynard*, 430 US 705 (1977) (compulsory display of ideologically objectionable slogan); *West Virginia Board of Education v. Barnette*, 319 US 624 (1943) (compelled flag statute) or monetary, *Abood v. District Board of Education*, 431 US 209, 234 (1977) (compelled union dues used to support political candidates). In its *Reconsideration*, the Commission cited *Abood*, finding it

> "...questionable whether ratepayors should be compelled to support views with which they do not agree." (67a)

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[58]The costs of political advertising are classified within Account 426.4, Expenditures for Certain Civil, Political and Related Activities. 16 NYCRR Chapter II, Account 426.4. Account 426.4 is derived from the Federal Power Commission (FPC) Uniform System, FPC Order No. 276, 30 FPC 1539, 18 CFR 101.426.4. These accounts are "below the line" expenses; *i.e.*, they are not properly income deductions, and so are chargeable to shareholders, not ratepayors. *Alabama Power Company, supra.* State cases have uniformly followed the federal practice of excluding political advertising from the rate base. See, *e.g., Boushey v. PG&E Co.*, 10 P.U.R. 4th 23, 27 (Cal. P.U.C. 1975) (bill insert opposing referendum on Coastal Conservation Act may not be charged to ratepayors directly or indirectly); *Southern Bell Telephone and Telegraph Co. v. La. P.S.C.*, 239 La. 175, 32 P.U.R. 3d 2 (La. S. Ct. 1960); *In re Pacific Power & Light*, 34 P.U.R. 3d 36 (Ore. P.U.C. 1960).

[59]This is the third interest protected by the First Amendment — the right to individual self-expression, see p. 12, fn. 36, *supra.* It is also, significantly, the interest whose protection is not implicated in the regulation of commercial, or corporate, as opposed to individual speech. See *First National Bank of Boston v. Bellotti*, ____*US*____, 98 S. Ct. 1407 (1978).

Thus the Commission had two powerful reasons for prohibiting controversial or "political"[60] bill inserts: a state regulatory interest in insuring that utility ratepayors only bear the cost of service-related benefits,[61] and the First Amendment's prohibition on compelled political subsidies.[62]

Despite these two clearly articulated interests, the New York Court of Appeals never reached the issue of forced subsidy. The District Court generally discussed, without resolving, the issue of cost allocation.[63] The District Court's opinion suggests, but does not hold, that if some magic formula could be devised which would shift all the monetary costs of bill propaganda to shareholders,[64] the statutory and constitutional problems of forced subsidy would disappear.

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[60]The Commission made it clear that it uses the terms "controversial matter of public policy" and "political" virtually synonymously. See *infra* at pp. 52-53.

[61]This could also be conceptually viewed as protecting ratepayors from unnecessarily or unlawfully subsidizing shareholders for costs clearly incurred for the latter's benefit.

[62]As Thomas Jefferson stated:

> "to compel a man to furnish contributions of money for the propagation of opinion which he disbelieves is sinful and tyrannical" I. Brant, *James Madison: The Nationalist*, 354 (1948) quoted in *Abood, supra* at p. 235, n. 31.

[63]Because Amici believe the subsidy issue is so critical, and because only the District Court discussed it, this section will focus on the District Court opinion. The District Court incorrectly viewed the allocation issue as simply an administrative problem, entirely ignoring its constitutional aspects.

[64]For the reasons discussed *infra* at fn. 68, there is no such magic formula, and if there were, LILCO has indicated no desire to abide by it. It is precisely the fact that the shareholders save large amounts at the ratepayors' expense which makes the practice now banned by the Commission so attractive to LILCO and which undoubtedly provided the impetus for this litigation.

LILCO[65] contributed to this erroneous formulation of the issue in the District Court by a belated[66] and disingenuous offer to have its shareholders absorb all the *additional* out-of-pocket costs of placing its political messages in bill inserts. This offer also incorrectly assumed that if the allocation problem were solved, there would be no subsidy, hence no forced subsidy. This assumption is both factually and legally incorrect.

In fact, despite the District Court's speculations, the question of possible allocations is essentially irrelevant. The Commission correctly found[67] that accurate apportionment of costs properly chargeable to shareholders was impossible (67a).[68] Since there can be no

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[65]Because the only factual record as to subsidy was made in the District Court proceeding through discovery against LILCO, the discussion here will refer only to LILCO, although, of course, it applies equally in principle to Con Ed, Central Hudson, and all other utilities wishing to employ bill inserts.

[66]LILCO's "offer" on cost allocation was never made to the Commission, and was in fact tendered only after the District Court litigation began.

[67]The Commission, with long experience and substantial expertise in rate regulation and cost allocation, concluded that no fair allocation between the political and non-political uses of the billing process could be made (67a). As the regulatory agency charged with making such determinations, its decision is entitled to substantial deference by a reviewing court. See, *e.g., FCC v. National Citizens Committee for Broadcasting*, 436 US 775 (1977).

[68]The Commission advanced three arguments on the impossibility of accurate apportionment of costs: 1) apportionment ignores the reality that since bill envelopes are limited in size, LILCO's political messages take up space that could otherwise be used for useful conservation or service-related information — the value of which is problematic in terms of quantification; 2) any cost allocation could be circumvented by LILCO's cutting expenditures on customer service activities; 3) LILCO's electrical rates could be increased to offset loss of earnings due to allocation (JA 442, 443, 415). The California Public Utility Commission has made a similar determination that there can be no fair allocation. *Boushey, supra*, 10 P.U.R. 4th at p. 27.

fair or accurate allocation, there will always be some subsidy. Absent a complete proscription on controversial bill inserts, the utility will *always* derive an economic benefit by its use of the billing mechanism. This is so whether the ratepayors absorb all the costs, or as LILCO offered, the utility pays the costs directly attributable to insertion of the political material.[69] The real question then, is whether the Commission may or must act to prevent this forced subsidy. LILCO has attempted to persuade both this and the District Court that, under its offer, there would be no "subsidy" since it would be deriving only an "indirect benefit." Aside from the grossly misleading factual basis of this characterization,[70] it again mistakes the issue.

Since, as both the Commission and the District Court[71] found, there can be no "allocation" which does

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[69]There is, as District Judge Pratt recognized, a third alternative — that LILCO shareholders pay virtually *all* the costs of the bill mailing as well as the costs of its particular political bill inserts. This alternative is, of course, not properly before this Court. Amici do not believe that even this relatively extreme allocation would fully solve the problem of forced subsidy, since the utilities would still be deriving an economic benefit from the use of already created, up-to-date mailing lists, plant facilities, etc., paid for by ratepayors. In any event, for purposes of the summary judgment in the District Court, LILCO conceded that it will always derive at least an "intangible benefit" from its use of the billing insert mechanism (JA 342).

[70]The size of this "indirect benefit", as LILCO characterized it, can be very large indeed. Uncontroverted facts in the District Court record showed that if billing envelopes were not used to mail LILCO's pro-nuclear power inserts, LILCO shareholders would have to pay $117,000 for each first-class monthly mailing that contains such propaganda. The costs of envelopes and labor would increase this figure (JA 360). In 1975, for example, LILCO mailed four pro-nuclear power inserts, thus avoiding separate mailing cost of at least $468,000 (JA 358).

[71]The Court wrote that "[w]hatever allocation method might be used, however, to the extent that the cost of an insert is less than the cost of a separate mailing of the same insert, it would represent

(Footnote continued on next page)

not provide LILCO with *some* benefit, ratepayors will always be providing *some* degree of subsidy for LILCO's dissemination of political propaganda. The only question which remains is whether a non-cash or "indirect" subsidy which gives the utility a "free ride" is somehow distinguishable, for First Amendment purposes, from the directly compelled cash contribution struck down in *Abood, supra.*

As discussed below, neither logic, policy nor case law support such a distinction. For clarity of analysis we will first briefly discuss the First Amendment principles enunciated in *Abood* and other compelled subsidy cases, and, second, demonstrate the complete irrelevance of the cash/non-cash distinction which LILCO proposes.

1. The First Amendment Protects Individuals From Compulsory Subsidization of Political Views With Which They Disagree

This Court has long recognized that individuals may not, constitutionally, be compelled to finance the dissemination of ideas with which they disagree. *Abood, supra*; see *Buckley v. Valeo*, 424 US 1, 91, n. 124 (1976).[72] These cases most often arise in a labor context, and provide a striking analogy to the utility ratepayor situation. Union members, like ratepayors, have no choice but to pay their "dues" to an institution designated by

a benefit or 'free ride' to shareholders which had been paid for by ratepayors" (JA 444). Unfortunately, however, the Court simply let this finding drop, and never utilized it to determine the First Amendment subsidy issue raised by Intervenor.

[72]In upholding the constitutionality of public financing of presidential election campaigns this Court relied on the voluntary nature of the check-off system, distinguishing it from prohibited *compulsory* subsidation. *Involuntary* subsidies have, however, always been treated differently. See *Bellotti, supra* at p. 794, n. 34.

the government,[73] but the legality of the union shop does not support the notion that the exacted dues, fees or assessments can be

> "used as a cover for forcing ideological conformity or other action in contravention of the First Amendment...." *Railway Employees' Department v. Hanson*, 351 US 225, 238 (1956).

In *Abood*, this Court found "meritorious" the view that union members

> "may constitutionally prevent the Union's spending a part of their required service fees to contribute to political candidates and express political views unrelated to its duties as exclusive bargaining representative."[74] *Abood, supra* at p. 234.

This Court cited a long line of cases holding that the government may not compel an individual to support any one ideological view without violating the First Amendment.[75] It reasoned that the same impermissible result follows where the government gives power to private groups[76] — like labor unions (or utility companies) — to abridge these same First Amendment rights.

[73]Congress may, consistent with the First Amendment, require employees to affiliate with a union as a condition of their employment. *Radio Officers Union v. NLRB*, 347 US 17 (1953). The state's grant of monopoly status to utilities similarly requires the ratepayor to obtain and pay for necessary services from a particular company. See *Utility Companies and the First Amendment, supra* at p. 925.

[74]This is analogous to the question of service-related benefits for utility ratepayors. See fn. 55, *supra.*

[75]See, *e.g., West Virginia Board v. Barnette, supra.*

[76]*Abood* appears to be unaffected by this Court's decision in *First National Bank v. Bellotti, supra.* See *Anderson v. City of Boston*, 380 N.E.2d 628 (Mass. 1978), *dismissed for want of a substantial federal question* at 99 S. Ct. 822, 59 L.Ed. 2d 26 (1979). In *First National Bank*, the majority found that there was no prohibited compulsion of *shareholders*, since the retention of corporate shares is entirely a matter of free choice, and shareholders who disagree with management's views may simply sell their shares. *Id.* at pp. 794-95. Justice

(Footnote continued on next page)

2. "Indirect" or Non-cash Subsidies Are Similarly Precluded by the First Amendment

If the First Amendment precludes involuntary direct cash subsidies to political causes, it is difficult to imagine that more sophisticated subsidization techniques may permissibly achieve the same result, yet that is precisely LILCO's position. This argument fails for two reasons.

a.) "Indirect" Subsidies

First, even though individual ratepayors may not be required to make a particular cash payment specifically for dissemination of LILCO's political views,[77] if LILCO is permitted to use the ratepayor-financed billing envelope for mailing its propaganda, its "saving" from the "free ride" it has received is the precise and functional equivalent of a cash contribution in that amount.[78] See *Retail Clerks International Association v. Schermerhorn*, 373 US 746 (1963).[79] This Court clearly recognized this principle in upholding the limitation in certain non-cash contributions on *Buckley v. Valeo, supra* at p. 37.

White, dissenting, argued that such "choice was illusory." Clearly, however, under either analysis, ratepayors, unlike shareholders, have no such choice to "opt out." See generally, *Note, Municipal Free Speech Banned in Boston*, 47 Fordham L. Rev. 1111, 1122-24, 1134-37 (1979).

[77]Clearly the Commission could not, under state law or the Constitution, require or permit each customer to pay $117,000/900,000 or $0.13 to do each pro-nuclear political mailing.

[78]*I.e.*, if the ratepayors pay $117,000 to mail a bill and LILCO pays nothing to use it, LILCO has saved $117,000 which it can use for any purposes — including additional political advertising in other forms — it wishes.

[79]Like the union budget discussed in that case, LILCO's budget of expenditures and income is balanced. If it may use funds involuntarily supplied by *all* ratepayors in order to disseminate viewpoints to which only LILCO management and *some* ratepayors subscribe, the company has more shareholder money available to it to engage in other forms of political advertising.

Further, dissenting ratepayors who disagree with LILCO's messages are bearing a disproportionate share of the costs associated with the legitimate, non-controversial aspects of day-to-day utility service. This "disproportionate share" is enough to constitute a "contribution" which may not constitutionally be compelled. See *Schermerhorn, supra* at p. 754.[80]

The fact that dissenting ratepayors are making an "indirect" rather than a direct contribution is, accordingly, irrelevant.[81]

b.) Non-cash Subsidies

LILCO made one final argument in its attempt to avoid the clear holding of *Abood*. This is, in essence, that because a free ride is free,[82] it is somehow not a pro-

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[80]For example, assume that there are two classes of LILCO ratepayors: those who agree with and those who dissent from its political message. Failure to proscribe controversial bill inserts has the effect of increasing LILCO's political advertising fund. The dissenting ratepayors are getting "less" for their dollar — *i.e.*, only utility service and not political propaganda suitable to their tastes. The ratepayors in agreement with LILCO are getting "more" for that same dollar — *i.e.*, the same utility service *plus* the ability to have their viewpoint (shared by LILCO management) foisted on other ratepayors, in an effort to change their minds. By this reasoning, enunciated in *Schermerhorn* but reiterated as recently as in *Abood, supra*, p. 237, fn. 35, the dissenting ratepayors are bearing a disproportionate share of the cost of utility service.

[81]As this Court wrote in *Buckley v. Valeo, supra* at pp. 36-37:

> "[t]he expenditure of resources at the candidate's direction for a fundraising event at a volunteer's residence or the provision of in-kind assistance in the form of food or beverages to be resold to raise funds or consumed by the participants in such an event provides material financial assistance to a candidate. The ultimate effect is the same as if the person had contributed the dollar amount to the candidate and the candidate had then used the contribution to pay for the fundraising event or the food."

[82]*I.e.*, it costs the donor nothing, or nothing more than s/he would be spending anyway. The correct focus in determining whether there is a subsidy is, however, on the *benefit* to the *recipient*. See discussion below.

hibited subsidy or contribution. But, as well settled case law demonstrates, a subsidy or contribution which may be regulated when received in cash may be similarly regulated when received in another form.[83] A number of analogies, including legislation controlling the franking privilege,[84] postal rates,[85] federal election

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[83]This is, of course, precisely what Congress determined, and what this Court upheld in *Buckley v. Valeo, supra* at pp. 36-37. See fn. 81, *supra*.

[84]Under the franking privilege, members of Congress may send certain information to their constituents free of charge. However, enclosing other, proscribed, material in the franked envelope is prohibited even though it would result in no additional cost to the taxpayers who ultimately bear the cost of the franked mailing. (See 39 USC § 3210(a)(5)(C) [Solicitation of political support prohibited], 39 USC § 3210(a)(5)(D) ["free rides" for material enclosed for the benefit of any person, organization, etc. prohibited]). These anti-free ride provisions have been uniformly upheld by Courts. *E.g., Rising v. Brown*, 313 F. Supp. 824 (C.D. Cal. 1970); *Schiaffo V. Helstoski*, 350 F. Supp. 1076 (D. N.J. 1972), *aff'd in part, rev'd in part*, 492 F.2d 413 (3d Cir. 1972).

[85]For an application of the anti-free ride rule in this area, see 39 USC § 4554(a)(1) and § 4555(a) which define content requirements for fourth-class postal rates. If any improper material is enclosed with the fourth-class matter — *e.g.*, personal correspondence — the reduced postage rate is forfeited.

campaign contributions,[86] and of course, the "free ride"[87] itself support this conclusion.

Since the law clearly may and does proscribe subsidies which are no more than "free rides," it must, under the reasoning of *Abood, Schermerhorn, et al.*, proscribe similar subsidies when this is necessary to protect the First Amendment rights of dissenting ratepayors.

In two recent cases, lower courts have enjoined, on constitutional grounds, the very kinds of non-cash subsidies which LILCO argues the Commission is powerless to prevent, *Anderson v. City of Boston, supra*;[88] *Moun-*

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[86]Under the Federal Election Campaign Act of 1971, as amended, corporations are forbidden from making contributions or expenditures in connection with Presidential or Congressional elections. 2 USC § 441(b). Proscribed "contributions" include:

> "...any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services or *anything of value....*" *Id.* (emphasis added)

The Federal Election Commission, which is charged with interpreting the Act, has frequently dealt with the argument that non-cash contributions or expenditures are different from cash subsidies. It has consistently rejected such arguments, focusing not on the cost to the donor, even if minimal or non-existent, but on the "benefit" to the candidate provided by the donor's assistance. See, *e.g.*, AO 1975-4 [1975] FED. ELEC. CAM. GUIDE (CCH) § 34084 [the donation of the use of a computer]; AO 1975-4 [1975] FED. ELEC. CAM. GUIDE (CCH) § 5104; OC-1975-100 [the endorsement or guarantee of a loan]; OC-1975-107, Letter of March 2, 1976, from John G. Murphy, General Counsel for the FEC, to Julie Noel Gilbert [the provision by a hotel of free furniture for apartments occupied by political staffers].

[87]The classic, prototypical anti-free ride statute is 49 USC § 1(7) which prohibits "free rides" for all but certain classes of passengers on railroads and other carriers. The New York counterpart of the federal anti-free ride statute is N.Y. Transp. Law § 103.

[88]The Massachusetts Supreme Court held that the

> "use of telephones and printed materials provided by public funds, and...use [by volunteers] of facilities paid for by public funds, would be improper, at least unless each side were given equal representation and access." 380 N.E.2d at p. 641.

Its opinion relied heavily on the decisions in *Abood, supra*, and *Buckley, supra*.

tain States Legal Foundation v. Denver School District, 459 F. Supp. 357 (D. Col. 1978).[89] In both cases, there was no issue of monetary contribution, but certain facilities were used to further a particular political viewpoint. The facilities used in both cases were financed by "publicly collected funds."[90] *Id.* at p. 361.

The funds collected by LILCO from ratepayors are, similarly, publicly collected.[91] The facilities they finance, *e.g.*, postage, envelopes, customer lists, and related mailing and stuffing expenses, may not, similarly, be used to disseminate one side of a political issue without violating the First Amendment's proscription against compelled subsidies.

For all these reasons, the Commission's ban on controversial bill inserts is necessary to prevent a forced

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[89]The District Court found a First Amendment violation where a school board allowed its telephones and facilities to be used during non-working hours by volunteers for the purpose of contacting the public to urge the defeat of a referendum.

[90]See also, *Cammarano v. United States*, 358 US 498, 515 (1959) (Douglas, J., concurring):

> "[The taxpayers'] proposition savors of the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State. Such a notion runs counter to our decisions *(Grosjean v. American Press Co.*, 297 US 233, 250; *Murdock v. Pennsylvania*, 319 US 105, 112; *Follett v. McCormick, supra*, at 578*)*, and may indeed conflict with the underlying premise that a complete hands-off policy on the part of government is at times the only course consistent with First Amendment rights. See *McCollum v. Board of Education*, 333 US 203."

Significantly, in *McCollum*, cited with approval by Justice Douglas, this Court struck down the use of school facilities for religious purposes as an unconstitutional subsidy.

[91]As discussed *infra* at fn. 155, the Commission has determined that if it permitted LILCO to use the ratepayor-financed bill insert mechanism it would clearly be engaging in "state action." It is the power and obligation of the State to set rates and regulate their collection which makes the funds "publicly collected," although such a determination is not required by *Abood*.

subsidy of LILCO's and all other utilities' political views by their ratepayors. As such it is permissible as a matter of state law and compelled as a matter of constitutional law.

B) Protection of Privacy in the Home and the "Captive Audience"

The second "state interest" supporting the Commission's ban and relied upon by the New York Court of Appeals (10a) is the protection of ratepayors, in the privacy of their homes, from having offensive and/or disagreeable ideas unavoidably thrust upon them. Like forced subsidy, this separate First Amendment interest of ratepayors[92] is, in and of itself, sufficient ground for upholding the ban under both the general First Amendment analysis offered here, and under specific decisions of this Court dealing with offensive mail and the degree of protection accorded to privacy in the home.

It is unquestioned that the State has the policy power

> "...to protect the peaceful enjoyment of the home" *Hynes v. Mayor of Oradell, supra* at 619.

Where "offensive material" may unwelcomely intrude on the privacy of the home,

> "...the individual's right to be let alone plainly outweighs the First Amendment rights of an intruder." *FCC v. Pacifica Foundation*, 438 US 726 (1978). [93]

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[92]As this Court has written,

> "...the right of every person 'to be let alone' must be placed on the scales with the right of others to communicate." *Rowan v. Post Office Dept.*, 397 US 728, 736 (1970).

[93]This is not unlike this Court's previous holding that

> "[w]e...categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another." *Rowan, supra* at p. 738.

Thus, the operative concepts are 1) "offensive material" which is 2) unavoidably "thrust upon" 3) an unwilling receiver, in 4) the privacy of his or her home. All four requirements of the *Rowan-Lehman-Pacifica* test are met in the use of the billing mechanism for dissemination of a utility's views on controversial issues. See, *FCC v. Pacifica Foundation, supra; Lehman v. City of Shaker Heights*, 418 US 298 (1974); *Rowan v. Post Office Dept., supra.*

That the utility's views may be offensive to some ratepayors[94] has not been seriously contested.[95] The "unavoidability" of contact with the potentially offensive message is inherent in the "necessity"[96] of the ratepayor opening his or her utility bill. Like the rider of public transit, but to a far greater degree, the ratepayor who receives a utility bill has no choice but to be exposed to

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[94]As this Court has recognized,

> "...what may not be provocative to one person may well be to another...." *Rowan, supra* at p. 737.

[95]In the federal court action, LILCO admitted that some of its ratepayors "would be genuinely upset by an insert." We note also that for the same reasons "sexually explicit pictorial material" which is "not obscene," may be "deeply disturbing...," pro-nuclear propaganda, which many see as involving the "rape" of nature and "the destruction of future generations," is equally "disturbing." *Cf., Public Media Center v. FCC, supra.*

[96]As this Court noted in an earlier case dealing with street cars, a public utility,

> "...a streetcar audience is a captive audience because it is there *by necessity, not choice.*" *PUC v. Pollak*, 343 US 451, 460 (1952); see, *Lehman v. City of Shaker Heights, supra.*

its contents[97] — he or she is, accordingly, truly a member of a "captive audience."[98]

The unwilling receiver who is part of a "captive audience" is entitled to far more protection in the home than s/he is elsewhere. For example, whatever the interest of an individual in avoiding unwelcome and offensive messages "...in a courthouse corridor...," this Court has held

> "...surely it is nothing like the interest in being free from unwanted expression in the confines of one's own home." *Cohen v. California, supra* at p. 22.

Further, unlike absolute bans on canvassing which have been struck down by this Court[99] on the grounds that they unfairly or unreasonably[100] preclude the only available means by which a speaker's message can be conveyed,[101] or requirements that a householder

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[97]The absolute necessity to open and view the content of a utility *bill*, if one wishes to maintain vital services, is far different from the homeowner's ability to throw away junk mail unopened, or to exclude the unknown or undesired canvasser from his/her house (JA 407).

[98]The "necessity" factor here distinguishes the instant case — and *Lehman* — from the canvassing cases relied upon by the utilities. There the homeowner has an unfettered ability to exclude the unwelcome visitor. Here s/he does so only at the cost of doing without an essential service, *cf., Jackson v. Metropolitan Edison Co.*, 419 US 345 (1974), since not to open the bill means not to pay it; not to pay it means deprivation of electric service.

[99]It should be noted that many of the anti-canvassing bans which this Court has refused to uphold have been deemed constitutionally infirm because of vagueness, overbreadth, lack of a review procedure, uncircumscribed discretion in local officials, etc., none of which is present in the instant case. See Point IV, *infra.*

[100]*E.g., Martin v. Struthers, supra; Hynes v. Mayor of Oradell, supra.*

[101]See, *Lamont v. Postmaster General*, 381 US 301 (1965) where, in order to receive otherwise protected political information, an individual was essentially required to officially designate him/herself a "Communist sympathizer," a requirement which this Court found would have a deterrent effect, especially to those with sensitive positions. *Id.* at p. 307.

must specifically and publicly request information on unpopular views in order to receive it, the decision about whether individuals in the community may receive a utility's views is not a matter of governmental prohibition, but, at best, only of the utility's pocketbook!

Precluded from the compulsory, obtrusive and privacy-invading use of the billing mechanism, the utilities stand on precisely the same footing[102] as anyone else who wishes to communicate their views to citizens *through the mails*. The citizen who receives a utility's pro-nuclear propaganda in any envelope other than her/his utility bill may open and peruse it, or throw the envelope away unread. The Commission's ban is, accordingly the *only* way to insure that the homeowner or addressee makes the final judgment as to what is or is not to be admitted to her/his "castle." *Rowan, supra.*

C) Compliance with Non-Discrimination Provisions of State Law

Another state interest advanced by the Commission was its finding that use of the bill insert,

> "confers an unreasonable advantage on management that discriminates against others who may not share or who oppose the company's views." (65a)

This was no abstract attempt to "equalize speech resources," as LILCO has argued. Rather, the Commission's finding and the limited ban it imposed was a proper and necessary action under applicable state utility law which prohibits

[102]See, *e.g., Cammarano v. United States, supra* at p. 513. *Cf. First National Bank of Boston v. Bellotti, supra* at 782.

> "undue or unreasonable preference or advantage" in "service," "privilege or facility."[103]

The New York statutory scheme does not seek to equalize speech resources by muting or silencing "stronger" voices. Instead, as the New York Courts have found, it requires all utilities[104] to provide service equally, and without favor, to all its customers. See, *e.g., Hayes v. Niagara Mohawk Power Corp.*, 63 Misc. 2d 581, 312 NYS 2d 436, 437 (Sup. Ct. Onondaga Co. 1970); *Brewer v. Brooklyn Union Gas Company, supra*, 33 Misc. 2d at 1019.

"Service" necessarily includes the mailing of bills and other enclosed materials,[105] *cf., Pollak v. Public*

[103]Under applicable law, utility companies are prohibited from making or granting

> "...any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or subject[ing] any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." NY. Pub. Serv. Law, § 65(3)

or from extending

> "...to any person any form of contract or agreement, or any rule or regulation, or any privilege or facility, except such as are regularly and uniformly extended to all persons under like circumstances." NY Pub. Serv. Law, § 66(12)

[104]It must again be emphasized that the utilities are not ordinary commercial entities competing with similar entities in the marketplace, but providers of essential services whose monopoly position has been conferred by the state's franchising power. Concomitant with this unnatural advantage is the obligation to serve the public interest; this obligation is the basis of the Public Service Law and the PSC's regulations. See, *e.g., Brewer v. Brooklyn Union Gas. Co.*, 33 Misc. 2d 1015, 228 N.Y.S.2d 177, 182 (Sup. Ct. 1962).

[105]Clearly it is the "service" aspect of billing and bill inserts which gives the Commission the power and obligation to regulate them (4a).

Utilities Commission, 191 F.2d 450 (D.C. Cir. 1951), *rev'd on other grounds*, 343 US 451 (1952).[106] Similarly, the billing mechanism is a "facility," whose use for political purposes would clearly constitute a "privilege."

The Commission could statutorily and constitutionally prohibit a utility from charging lower rates to customers of whose politics it approved. It could also bar a utility from permitting free use of the company auditorium by Republicans rather than Democrats. For the same reasons, and under the same authority, the Commission properly prevented use of the billing mechanism as a conduit for pro-nuclear propaganda favoring corporate management and shareholders to the detriment of Amici and other customers.

D) Preservation of Bill Inserts for Necessary and Required Consumer or Ratepayor Information

Another important state interest advanced by the Commission was the necessity to preserve and conserve

> "...the primary function of bill inserts, namely, to convey information that is clearly helpful to consumers." (JA 454)

The Commission's power to regulate bill inserts[107] must be exercised to insure those "useful and necessary services which facilitate...the 'distribution' and 'sale' of utility power." *Matter of National Merchandising Corp. v. Public Service Commission*, 5 N.Y.2d 485, 490-91, 186 NYS2d 47, 50-51 (1959); N.Y. Pub. Serv.

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[106]In that case the term "service" was broadly defined to include the playing of music on buses. In any event, what is or is not a "service" for this purpose is a matter of state law. The Commission has held that billing is a service, the New York Court of Appeals did not disagree, and the matter is foreclosed.

[107]The Legislature has granted the Commission express authority "to fix and regulate the format and informational requirements of bills utilized by public and private gas corporations, electric corporations and gas and electric corporations in levying charges for service, to assure simplicity and clarity...." NY Pub. Serv. Law § 66(12-a).

Law § 82(10)-(12). It has regulated utility bill inserts to provide just those facilitating services, *e.g.*,

> appeals for the conservation of gas or electricity; notification of emergency conditions and procedures; instructions in the proper use of the equipment which makes use of the utility's service; information about new rates, new billing practices, or new inspection or meter reading schedules; advice concerning hazards associated with the utility's service; reports on matters of interest to the public concerning the utility's service—such as service difficulties and progress in overcoming them, projections of new capacity additions, plans for new or improved means of providing service, and the like. *Policy Statement* (44a)

In addition to identifying these "services" which the bill insert can and should perform,[108] the Commission has recognized that

> "The bill insert is not only a unique medium of communication, it is also quite limited." *Reconsideration* (65a)[109]

Accordingly, the Commission found that prohibition of the use of bill inserts for political propaganda was necessary to conserve that limited resource for its primary, proper and statutorily mandated purposes (65a). This finding constitutes an independent, significant state interest served by the ban.

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[108]The efficacy of bill inserts in conveying non-controversial consumer information about issues like rates and billing procedures was demonstrated by a survey commissioned by LILCO which is part of the record in the federal case (JA 403).

[109]The limitation is not only of size and weight (*i.e.*, that the insert fit within the billing envelope without increasing postage costs), but of frequency, since

> "an insert can be used only so often as a bill is sent by the utility company, usually once a month, but in many cases only once in every other month." *Id.*

E) Avoidance of a Public Forum/First Amendment Difficulties of Administering a Shared Access Scheme

Although the New York Court of Appeals did not address the issue, the District Court found that the final state interest furthered by the Commission's ban was the "avoidance" of the emergence of a public forum, and the Commission's careful consideration and resolution of the public forum/shared access issue[110] shows extreme sensitivity to all the First Amendment implications of that issue.

What the Commission actually did, and what the District Court ratified, was to find that an absolute ban on use of the bill insert mechanism for controversial material was a less restrictive intrusion on First Amendment rights than its otherwise constitutionally compelled involvement in administering a shared access scheme.

It cannot be said that in rejecting "shared access," the Commission acted unreasonably. The same concerns it expressed about endless litigation, the unfairness of administering such a scheme,[111] etc. were found to have substance in connection with a paid access scheme that this Court found could reasonably be rejected by the Federal Communications Commission. *Columbia Broadcasting System v. Democratic National Committee*, 412 US 94 (1973).

Accordingly, the Commission's and District Court's determination that an absolute ban was less restrictive of First Amendment interests than the creation of a

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[110]See discussion at Point V, *infra*.

[111]Administering an access scheme is not only time-consuming and difficult — thus taking the Commission's energies from its other statutorily compelled obligations to the public — it also involves the Commission (and hence the "State") in extremely intrusive decisions about content, viewpoints, proper balance on particular issues, etc., which would raise a whole host of First Amendment problems.

public or quasi-public forum with concomitant access requirements[112] provides a final "state interest" for sustaining the ban.

POINT II

THERE IS NO NEGATIVE EFFECT EITHER ON A UTILITY'S RIGHT OR ABILITY TO SPEAK, OR ON THE INTERESTS PROTECTED BY THE FIRST AMENDMENT.

As already discussed, there are a number of "substantial," "important" and even "compelling" state interests, as well as First Amendment rights of Amici and others which require the limited ban adopted by the PSC. The question which remains — and which can be easily disposed of — is what, if any, prohibited "abridgement" of the utilities' First Amendment rights results from the ban. Implicit in our analysis, though conceptually separate, is the related question of what, if any, negative or detrimental effects the ban has on any

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[112]Given the general First Amendment analysis we have engaged in, and particularly looking to the opposing First Amendment rights of ratepayors discussed *supra* at Points I (A) and (B), the ban can be sustained without this Court deciding this issue one way or another. If, however, the Court reaches the issue and finds the ban was *not* the least restrictive means available, it must also hold that shared access is, and remand so that the Commission may institute such a scheme consistent with its First Amendment obligations.

of the interests protected by the First Amendment. The answer to both questions, clearly, is none.[113]

This is not a case where a utility is forbidden to speak its views on a particular matter, see, *e.g., Linmark Associates, Inc. v. Willingboro*, 431 US 85 (1977), nor on "political" issues in general, *e.g., First National Bank of Boston v. Bellotti, supra.* The Commission's limited ban does not prohibit a utility from using the only means, or only practical means to convey its view. *E.g., Hynes v. Mayor of Oradell, supra* at pp. 624-628 (Brennan, J., concurring).[114]

After the ban, as before it, a utility is free to speak its views on controversial matters by every conceivable means. It can, as LILCO has in the past, employ newspapers, the broadcast media, distribution of literature,

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[113]This is similar to Justice Powell's analysis — and conclusion — in *Young v. American Mini-Theatres, supra* at p. 78 (concurring op.). In examining "the effect of [the challenged] ordinance upon freedom of expression," he found "essentially two inquiries." These were:

> "(i) Does the ordinance impose any content limitation on the creators of adult movies or their ability to make them available to whom they desire, and
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> (ii) does it restrict in any significant way the viewing of those movies by those who desire to see them?" *Id.*

He found, as the New York Court of Appeals and District Court have already held in this case,

> "On the record in this case, these inquiries must be answered in the negative." *Id.*

[114]In *Hynes*, this Court struck down a municipal ordinance requiring advance notice to the police department before canvassing, soliciting, or otherwise calling from house to house, although other means of communication, such as direct mail, were theroretically available because, as Justice Brennan wrote, "[t]he oppressive financial burden of campaigning makes reliance on volunteers absolutely essential." The cost of sending a separate mailing expressing its views clearly would not be "oppressive" to a utility, as the record in the federal case demonstrates.

public meetings[115] and the like. Even more significantly, a utility is perfectly free to utilize the mails and the mailbox of each homeowner on the same basis *as any other speaker* who wishes to convey his/her views on any issue (JA 454).[116]

As this Court wrote, upholding the denial of a business tax deduction for certain political speech,

> Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but *are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do* under the provisions of the Internal Revenue Code. Nondiscriminatory denial of deduction from gross income to sums expended to promote or defeat legislation is plainly not " 'aimed at the suppression of dangerous ideas.' " *Cammarano v. United States, supra* at p. 513. (emphasis added)

Similarly, the even-handed treatment of utilities is not aimed at the suppression of their ideas, and their First Amendment rights have not in any way been "abridged" by the Commission's limited ban.[117]

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[115]The record in *LILCO* shows that it has, to a greater or lesser extent, employed all these other means to convey its views on, *e.g.*, the desirability of nuclear power (JA 365, 379).

[116]If Amici or others were permitted to use utility bills for dissemination of their views, the situation would, of course, be different. This unfair "enhancement" of speech channels for one side was, however, what the Commission attempted to avoid in preventing bill inserts from becoming a "public forum." See Point I (E), *supra.*

[117]This Court has recognized that the imposition of some additional cost on the ability of a regulated business to speak does not necessarily infringe that business's First Amendment rights. See *Young v. American Mini-Theatres, supra* at p. 78 (Powell, J., concurring) ("The constraints of the ordinance with respect to location may indeed create economic loss for some who are engaged in the business.") Here, of course, a utility isn't required to spend *more* than anyone else; it is simply denied a "free ride" at the unwilling public's expense. See Point I (A), *supra.*

Abridgement of relevant interests protected by the First Amendment,[118] *i.e.*, preservation of a free marketplace of ideas and that "robust debate" necessary to informed self-government, is equally absent in this case. Individual citizens are not prevented from obtaining information which they need to make important choices in their lives, see *e.g., Virginia State Board, supra*, nor are they denied factual matter "of clear public interest," *Bigelow v. Virginia*, 421 US 809, 822 (1975).[119] The ban does not result in the suppression of information which "inhibits public scrutiny" and the "free discussion of governmental affairs," *Landmark Communications, Inc. v. Commonwealth of Virginia*, 435 US 829, 838 (1978), nor does it "dampe[n] the vigor and limi[t] the variety of public debate." *Miami Herald Publishing Co. v. Tornillo, supra* at p. 257,[120] quoting *NY Times v. Sullivan, supra.*

[118]The third interest which is sometimes seen as included with the First Amendment's prohibition on the abridgement of freedom of speech is that of the value of and necessity for individual self-expression. See, *e.g.*, fn. 36, *supra* at p. 13. This interest, unlike the other two, is however, *not* implicated in the case of speech by a commercial entity. See, *e.g., Bellotti, supra* at 777, fn. 12 (Opinion of the Court) and 804-805 (Dissenting Opinion of White, J.); *Roberts, supra* at 138-139, 144.

[119]In that case, unlike *Virginia State Board*, the protected commercial speech "did more than simply propose a commercial transaction." In announcing the availability of abortions in New York, "the advertisement related to activity with which, in at least some respects, the State could not interfere." *Virginia State Board, supra* at p. 760.

[120]The constitutional vice of the press "right to reply" statute struck down in *Tornillo* was the fear that newspapers would steer away from controversy which would require a reply, thus limiting public debate on many issues. It is significant that this Court reached a different result in upholding the fairness doctrine in *Red Lion, supra*. There the necessity for regulation was justified by the advantage conferred on the licensee in awarding it the use of a limited resource, and the concomitant obligation to use that resource "in the public interest." A utility's monopoly position and its obligation to operate "in the public interest" make *Red Lion* the more analogous case, though here, as in neither *Tornillo* nor *Red Lion*, there is no real limitation on the ability to engage in debate.

The record in the *LILCO* case showed that the advisability of nuclear power has been widely discussed in Long Island, with all views, including LILCO's, well aired (JA 334). Public knowledge of, and ability to make electoral decisions about this and other "controversial matters of public interest" on which LILCO or any other utility wishes to express its views are in no way diminished by a utility's inability to use utility bill inserts to convey those views.

As Justice Powell wrote about the ordinance in *Young, supra*, the effect of the ban here on both a utility's right to speak, or the public's right and need to hear "...is incidental and minimal." Whatever test may be applied in the instant case, the "incidental and minimal"[121] effect on a utility's First Amendment rights cannot defeat the important and substantial State interests advanced by the Commission, and the First Amendment rights of Amici and other ratepayors.

POINT III

THE COMMISSION'S BAN WAS PROPERLY UPHELD AS A REASONABLE TIME PLACE OR MANNER RESTRICTION.

The New York Court of Appeals found that the bill insert ban was sustainable as a reasonable time, place or manner restriction, since it satisfied all criteria necessary to meet that test, *i.e.*, that it was content-

[121]He also noted, as is equally applicable here,

"The communication involved here is not a kind in which the content of effectiveness of the message depends in some measure upon where or how it is conveyed. *Cf., Cox v. Louisiana*, 379 US 536 (1965); *Brown v. Louisiana*, 383 US 131 (1966); *Police Dept. of Chicago v. Mosley*, 408 US 92, 93 (1972)." *Young v. American Mini-Theatres, supra* at p. 78, n. 2 (Powell, J., concurring).

neutral, supported a significant government interest, and did not foreclose alternative channels of communication (9a-11a).

The District Court also wrote about reasonable time, place or manner, but had somewhat more difficulty fitting the PSC ban into the parameters of that test, since it found the general analysis "broke down" on the issue of content neutrality.[122]

The difference in opinions below points up one apparent analytical difficulty with use of the test as it has been applied to the question of content neutrality in the past. Additionally, Amici recognize a small but additional "gap" between this Court's actual decisions[123] in this area, and the use of the test in this case, *i.e.*, the extension of the time, place or manner test to restrictions of speech in places other than public streets and parks.[124]

Because Amici have set out to aid this Court in constructing a rigorous and complete conceptual framework, we will demonstrate that these "problems" are

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[122]The District Court ultimately did not sustain the PSC ban as a reasonable time, place or manner restriction, but rather on a combination theory which also relied on this Court's opinions in *Lehman v. City of Shaker Heights, supra.*

[123]There is, as discussed *infra*, no substantial difference between this Court's *holdings* in cases where the "time place and manner" test was dispositive, and to dicta extending that test in cases where it was not finally applied, or was merely suggested as a mode of analysis. Significantly, however, lower courts have taken the extension of the test as law and have used it as the basis for upholding regulations outside the area of parks and streets which is safely bounded by precedent. See, *e.g., John Donnelly & Sons v. Mallar,* 453 F. Supp. 1272 (D. Me. 1978) (privately-owned billboards). *Accord, Washington v. Lotze,* _____P.2d_____, 5 Med. L. Rep. 1069, 1072 (Wash. S. Ct. 1979).

[124]See footnote 27, *supra.*

resolved by careful analysis of this Court's decisions,[125] and by understanding the reasonable time, place or manner test as a mode of analysis which takes into account the various First Amendment interests already discussed.

A) Extension of Time, Place and Manner Beyond the Streets and Parks

Historically, this Court has upheld restrictions on speech as reasonable regulations of time, place or manner in traditional public fora such as streets, sidewalks. See, *e.g.*, Tribe, *supra* at pp. 688-89;[126] *Poulos v. New Hampshire*, 345 US 395, 398 (1953); *Kovacs v. Cooper*, 336 US 77 (1949)(public streets); *Cox v. New Hempshire, supra* (public sidewalks).

Recently, however, this Court has referred to time, place or manner regulations in cases far removed from

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[125]Some commentators have suggested that this Court's opinions in this area are "unhelpful", see, *e.g.*, Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject Matter Restrictions*, 46 Univ. Chicago L. Rev. 81, 99 (1978) (hereinafter "Stone"). Stone's article, like the work of Tribe and Amici in this brief, is an attempt to aid this Court in imposing order and developing a coherent theory from apparently contradictory, but clearly reconcilable opinions.

[126]Tribe analyzes the development of the concept of public forum and the test of reasonable time place or manner regulation simultaneously. He writes that the classification of streets, sidewalks and parks

> "...as public forums serves as constitutional shorthand for the proposition that, in addition to its usual obligation of content neutrality...government cannot regulate speech related conduct in such places except in narrow ways shown to be necessary to serve significant governmental interests... [in] such places...more focused regulations of 'time, place or manner' are constitutionally compelled." *Id.*, footnotes omitted.

A key concept here is the recognition that it is speech-related *conduct* which is being regulated; just as the government can reasonably regulate the place where picketers *march* with their messages, so here the state restricts only a utility's action in placing its message in utility bills, not the message itself.

these traditional settings, clearly implying that if the three "tests" of reasonable time, place or manner were met, the challenged governmental action would be upheld. See, *e.g., Virginia State Board*, 425 US at p. 771;[127] *Linmark Associates, Inc. v. Willingboro*, 431 US at p. 93;[128] *Buckley v. Valeo*, 424 US at p. 18.

To the extent that dicta in these and other recent cases has expanded the boundaries of speech-related conduct[129] properly subject to reasonable time, place or manner restrictions, it is apparent that this Court is in fact engaging in the kind of analysis previously suggested;[130] and that, accordingly, in making the same kind of analysis, the New York Court of Appeals acted permissibly in upholding the bill insert ban as a reasonable "time, place or manner" restriction.

[127]In *Virginia State Board* and *Linmark*, this Court has written that "...laws regulating the time, place or manner of speech stand on a different footing than laws prohibiting speech altogether," although *Virginia State Board* involved a prohibition on the advertising of prescription drug prices, and *Linmark* challenged the prohibition of "For Sale" signs on private property.

[128]In *Linmark*, for example, the challenged ordinance could not be justified as a reasonable "time place or manner" regulation because it failed to leave open ample alternative channels for communication, and because it "proscribed particular types of signs based on their content because [the town] fear[ed] their 'primary' effect — that they will cause those receiving the information to act upon it." *Id.* at p. 94. For a discussion of the connection between the content neutral test and regulations aimed at 'primary effect,' see Point III (B), *infra* at pp. 49-51.

[129]Again we note Tribe's highly technical but critical observation. It is precisely that these cases are about regulation of conduct — of "means" of speech, however closely related to the speech — that makes the "time place or manner" test and the *O'Brien* test so similar that at least some Justices have used them virtually interchangeably. See, *e.g., Young v. American Mini-Theatres, supra* at pp. 79-80 (Powell, J., concurring).

B) Relationship of the Ban to the Content of the Regulated Speech

The District Court found that,

> "[t]he third test for a valid time, place or manner restriction, however, is missing here, for it cannot be said that PSC's ban on the use of bill inserts to express views on 'controversial issues of public policy' is unrelated to the content of the regulated speech. Indeed, it is precisely because of content... controversial issues — that LILCO has been denied access to bill inserts as a medium for advocating nuclear power." (JA 455-56)

However, the Court determined that the "content-based" nature of the restriction was not dispositive, based primarily on its careful reading[131] of the plurality[132] and

[130]*I.e.*, a consideration of the state interests promoted by the regulation "weighed" in some manner against the costs to interests protected and promoted by the First Amendment. See Conceptual Framework, pp. 10-15, *supra*. This Court has in fact suggested the shift from "test" to analysis in *Buckley v. Valeo, supra*, writing

> "Those [classic time place or manner] cases stand for the proposition that the government may adopt reasonable time, place, and manner regulations, which do not discriminate among speakers or ideas, in order to further an important governmental interest unrelated to the restriction of communication." *Id.* at p. 18.

[131]The Court thoroughly analyzed the various bases of the decision, but also painstakingly compared all the relevant facts and criteria in *Lehman* with those in the instant case, finding the latter a more compelling case for the limited, but "content-based" restriction it upheld. (JA 460-464)

[132]The plurality opinion was written by Justice Blackmun, and joined in by Justices White, Rehnquist and The Chief Justice. It held that because the city transit system was "engaged in commerce" and was not a public forum, its choice concerning what kind of speech to permit on its car cards need only avoid being "arbitrary capricious or invidious." *Id.* at pp. 302-304.

concurring[133] opinions in *Lehman v. City of Shaker Heights, supra.* Although acknowledging that *Lehman* was "a close case"[134] the District Court held that

> "content restrictions...need not always be justified by state interests that are compelling. *Lehman* shows that if there is no public forum, then reasonable governmental restrictions on speech may be sustained providing they are not arbitrary, capricious or invidious."

The District Court's holding, insofar as it depended on a determination of "no public forum" need not rely entirely on the plurality opinion in *Lehman.* There is substantial additional support for the notion that the farther one moves from a traditional, open, public forum, the more reasonable and permissible it is for the govern-

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[133]Justice Douglas' concurring opinion was based on the primacy of the competing First Amendment interests of the street car's "captive audience" to be free from unwanted, offensive messages. See Point I (B), *supra* at pp. 31-34. The New York Court of Appeals also found this an important "interest" within the reasonable time, place or manner analysis (10a).

[134]The utilities have attempted to distinguish *Lehman* on the grounds, *inter alia*, that it did not involve *denying* a private property owner the right to do what s/he wished with her/his property. This argument is unavailing for two reasons. First, a substantial majority of this Court has strongly suggested that private ownership of the prohibited *means* of communication is irrelevant if the three-pronged "time place or manner" test is otherwise met, *e.g., Linmark Associates, Inc. v. Willingboro, supra*, and see, fn. 123, *supra.* Second, the billing mechanism, financed entirely by ratepayors, is hardly its "private property" in any accepted sense. *Cf., First National Bank of Boston v. Bellotti, supra*, where the means of political speech upheld was financed entirely by shareholders (as in Account 426.4, see, fn. 58, *supra*) rather than by the ratepayors, as here.

ment to regulate classes of speech.[135] Indeed, it is a combination of non-public fora,[136] captive audience,[137] and class-based,[138] viewpoint-neutral regulation which provides a coherent analysis that encompasses all of this Court's decisions, as well as the instant case.

An analysis which takes these three factors into consideration in the context of reasonable "time, place or manner" restrictions is, again, involved in the con-

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[135]See, *e.g.*, Tribe, *supra* at pp. 688-693; Stone, *Fora Americana: Speech in Public Places*, 1974 S. Ct. Rev. 233, 251-52. This analysis would create a spectrum with, at one end, public facilities created for the primary purpose of public communication ("public forums") somewhere in the middle, public facilities (like schools and libraries) created for purposes linked to expression ("semi-public forums") and, at the far end, "government institutions doing the people's business but not performing speech-related functions at all" (these would include jails, military bases and the like). At this far end, the government may exclude classes of peaceable speech which interfere in any way with the function of the government institution so long as the government observes a viewpoint-neutral stance in defining the content determined "class" of speech excluded.

[136]Content-based restrictions are, of course, permissible in privately owned, but public-looking fora such as shopping centers. *E.g., Hudgens v. NLRB, supra; Lloyd Corp. v. Tanner, supra.* The publicly-financed billing mechanism in the instant case falls, conceptually, somewhere between government/commercial and private.

[137]This Court wrote, after *Lehman*, that the State could validly regulate class-based (and therefore not content-neutral) non-obscene speech which was "sexually oriented" where "unconsenting adults" were involved. *Young v. American Mini-Theatres, Inc., supra* at pp. 69-70, at n. 33 (Opinion of the Court, per Stevens, J.).

[138]By "classes" of speech we mean such broad, but viewpoint-neutral distinctions based on content as political/non-political, *e.g., Greer v. Spock*, 424 US 828 (1976); partisan/nonpartisan, *United States Civil Service Commission v. National Association of Letter Carriers*, 413 US 548 (1973); or controversial/non-controversial, *Red Lion Broadcasting Co. v. FCC, supra.* This was essentially the position taken by the New York Court of Appeals in finding that the ban was "not content oriented" (11a).

stitutionally compelled weighing, or balancing of governmental and First Amendment interests.

Where the "place" where speech is regulated is one which need not have been opened in the first instance,[139] regulation by broad classes of content is permissible[140] so long as that regulation is "reasonable" and the state does not favor one viewpoint within the permitted or excluded class.[141] There is more speech, more opportunity for robust debate, and more opportunity for an informed citizenry than there might have been otherwise — and

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[139]For example, the army base in *Greer v. Spock, supra*, could have been closed to virtually all public speech. The choice to open it to all but *political* speech thus increases the total amount of debate, although adding nothing to discussion of candidates or the like. The First Amendment is thus furthered, rather than impaired, so long as the government doesn't take sides. This is a way of understanding *Lehman* as well; the city's uncompelled choice to open its system in a non-discriminatory fashion to commercial advertising increased in absolute terms the amount of information available in the commercial marketplace.

[140]This assumes, as in general "time place or manner" restrictions, that sufficient alternative channels remain for dissemination of the restricted speech. It is this portion of the test which primarily insures that "robust debate" required by the First Amendment.

[141]In discussing all the cases which have involved content-related distinctions, Stone distinguishes between narrowly defined subject matter restrictions (*e.g., Police Dept. of Chicago v. Mosley, supra*, disfavoring all but labor speech), and subject matter restrictions directed against broad classes of speech, cutting across a wide spectrum of issues. The latter including, *e.g., Columbia Broadcasting System v. Democratic National Committee, supra* and *Lehman, supra* (disfavoring all non-commercial public issue speech) and *Buckley v. Valeo, supra; Greer v. Spock, supra; Broadrick v. Oklahoma*, 413 US 601 (1973); and *United States Civil Service Commission v. National Association of Letter Carriers, supra* (disfavoring all partisan political speech) are infinitely less offensive to the First Amendment because of the far smaller chance of the government influencing one side of the debate by a viewpoint-differential effect. Stone, *supra* at pp. 112-114. See New York Court of Appeals opinion at 11a.

at the same time, whatever important state interests are advanced may also be satisfied.[142]

In the instant case, no speech is absolutely prohibited, there are clearly substantial and important state interests, there are numerous and effective [143] channels of communication left open to LILCO, and the means restricted is not a traditional public forum.[144] To the extent that the restriction is related to content, it is not related either to favoring or disfavoring a specific viewpoint, nor is it aimed at a particular action which persons who receive a specific message are likely to take. See, *e.g., Linmark Associates, supra* and fn. 113, *supra*. There is, in fact, little or no danger to First Amendment interests, and little or no possibility for arbitrary or capricious singling out of particular viewpoints.[145] Accordingly the bill insert ban can analytically as well as precedentially be justified as a reasonable restriction on the "time, place or manner" of speech.

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[142]Consider, for example, the state's interest in the aesthetic preservation of its environment *and* the concomitant economic interest in promotion of tourism which is weighed against a minimal intrusion on commercial speech involved in size and place regulation of billboards on public highways. *John Donnelly & Sons v. Mallar, supra; Washington v. Lotze, supra.*

[143]Under general "time place or manner" cases, it is irrelevant that a speaker may be deprived of what may be the *most* effective means of communication, so long as s/he is left with sufficient adequate means. *E.g., Kovacs v. Cooper, supra.* The record in the *LILCO* case showed that the means remaining to LILCO were as, if not more, effective than the restricted bill inserts.

[144]See Point I (E), *supra* at pp. 38-39.

[145]This is unlike, *e.g., Police Dept. of Chicago v. Mosley, supra*, which was actually a decision premised on the Equal Protection Clause, and not directly on the First Amendment.

POINT IV

THE COMMISSION'S PROSCRIPTION ON BILL INSERTS INVOLVING "CONTROVERSIAL MATTERS OF PUBLIC POLICY" IS NOT UNCONSTITUTIONALLY VAGUE

The utilities argue that the Commission's bill insert ban is unconstitutionally vague because

a) it fails to give adequate notice; and

b) it will deter utilities from engaging in protected communication; and

c) it vests overbroad discretion in public officials to regulate discourse.

(Brief of Con Ed, pp. 26-27; Amicus Brief of LILCO, pp. 37-39.)

Extant, relevant case law, the facts and record below, and common sense[146] give short shrift to these claims, as did the New York Court of Appeals[147] and the District Court.

First, the phrase "controversial matters of public policy" is well known, and almost identical to the phrase "controversial issues of public interest" employed in the Federal Communications Commission's fairness doctrine.[148] The latter has been upheld against a similar

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[146]The application of "common sense" is, of course, a most relevant consideration in the determination of vagueness claims. See, *e.g., Connally v. General Construction Company*, 269 US 385-391 (1926).

[147]The New York Court of Appeals, in upholding the bill insert ban, did not even deem it necessary to directly address the vagueness issue, although it was vigorously raised by the utilities there and in the lower State Courts.

[148]In *Connally*, the Supreme Court recognized that "well-known phrases" should not be held unconstitutionally vague. *Connally v. General Construction Co., supra* at pp. 391-92. It should be noted that the term is also quite similar to that used on the subsidy prohibition in *Abood, supra*, which apparently gave this Court no trouble.

claim of vagueness, *Red Lion Broadcasting Co. v. FCC*, 395 US 367, 395-96 (1969), with this Court noting that many years of usage and adjudication exist to provide appropriate guidance to persons whose actions may fall within the ban. Significantly, the Commission itself made reference to the FCC standard,[149] thus allowing utilities to examine a plethora of opinions which interpret the phrase.

Nor, in applying the term "controversial matters of public policy," is the Commission writing on a clean slate. It has determined to employ the term synonymously with "political" advertising[150] as it has used the latter term in classifying advertising expenses which must be included in Account 426.4.[151] That account has been the subject of numerous state judicial and regulatory decisions concerning the meaning of "political" advertising; the existence of such long-standing agency interpretation saves the ban from the utilities' claim[152] of unconstitutional vagueness. See, *e.g., United States Civil Service Commission v. National Association of Letter Carriers, supra* at p. 575.

As if all this were not enough, the Commission has stated its willingness to provide expeditious opinions in any particular bill inserts about which the utilities may be uncertain, *Reconsideration* (64a), the existence

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[149]See, *Reconsideration* (66a).

[150]In its decision in *Natural Resources Defense Council v. Consolidated Edison Co.*, Case 27036 (February 17, 1977), the Commission stated that "we have decided to prohibit utilities from using bill inserts to discuss political matters, including the desirability of future development of nuclear power."

[151]See fn. 58, *supra*.

[152]This claim is also somewhat disingenuous, since LILCO has agreed to abide by and cooperate with the Commission's cost allocation guidelines for Account 426.4. If it knows what to include as "political advertising" for accounting purposes, it also clearly knows what to *exclude* from bill inserts pursuant to the Commission's ban.

of such a procedure not only gives the utility adequate notice *before* it violates the bill insert ban,[153] it also independently saves the ban from a vagueness challenge. *United States Civil Service Commission v. National Association of Letter Carriers, supra* at pp. 579-80.

POINT V

IF THE COMMISSION'S BAN IS STRUCK DOWN, THIS COURT MUST ORDER THE COMMISSION TO IMPOSE A SHARED ACCESS OR "EQUAL TIME" SCHEME IN ORDER TO SATISFY THE FIRST AMENDMENT AND/OR THE STATE NON-DISCRIMINATION STATUTE.

Amici NRDC, *et al.* have argued from the outset of this proceeding in the Commission, that if a utility is permitted to use the ratepayor-financed bill insert mechanism to express its view on controversial matters, that mechanism will be transferred into a "public forum" or quasi-public forum[154] which in turn will constitutionally require a right of access for opposing viewpoints.

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[153]The record in the *LILCO* case showed that it has never employed the bill inserts either to respond to particular events, or to anticipate them (JA 351-358). This fact, coupled with the relative infrequency with which the inserts were mailed, seriously undercuts the dangers in the "deterrence" argument.

[154]The constitutional right of access to forums controlled by private entities performing quasi-governmental functions has been well established. *Marsh v. Alabama*, 326 US 501 (1946) (company town); *Wolin v. Port of New York Authority*, 392 F.2d 83 (2d Cir. 1968) (bus terminals); *Tinker v. Des Moines Community School District*, 393 US 503 (1969) (school grounds and building); *Women Strike for Peace v. Morton*, 472 F.2d 1273 (D.C. Cir. 1972) (national park grounds); *Albany Welfare Rights Organization v. Wyman*, 493 F.2d 1319 (2d Cir. 1974), *cert. denied* 419 US 838 (1974) (waiting room of county welfare office). The First Amendment protects not

(Footnote continued on next page)

Once the state permits the use of a means or channel of communication within its control[155] for the dissemination of a particular viewpoint[156] it must, consistent with the First Amendment and Equal Protection, open that

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only access to *places* where free speech rights are exercised, like streets and parks, it also protects access to *channels* of communication supervised in whole or in part by the government such as the student newspaper of the public school or university. See, *e.g., Lee v. Board of Regents of State College*, 441 F.2d 1257 (7th Cir. 1971); *Zucker v. Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969) (high school newspaper which has carried articles and letters on the Vietnam War and the draft is a forum for the dissemination of ideas, and cannot refuse to carry a paid advertisement opposing the war). Another such channel was found in the *Texas Bar Journal*, the official publication of the Texas state bar (a state agency), *Kadical Lawyers Caucus v. Pool*, 324 F. Supp. 268 (W.D. Tex. 1970). See also, *Wirta v. Alameda-Contra Costa Transit District*, 68 Cal. 2d 51, 56, 434 P.2d 982, 985, 64 Cal. Rptr. 430, 433 (*en banc*)(1967); *Kissinger v. New York City Transit Authority*, 274 F. Supp. 438 (S.D.N.Y. 1967); *Hillside Community Church, Inc. v. City of Tacoma*, 76 Wash. 2d 63, 455 P.2d 350 (Sup. Ct. of Wash. 1969) (*en banc*), and *Red Lion Broadcasting Co. v. FCC, supra.*

[155]It is this official permission, given by the state agency charged with regulating a state created monopoly in the performance of its public interest mandated, ratepayor financed activity, which transforms LILCO's use of bill inserts to state action and which distinguishes the instant case from the narrower holding in *Jackson v. Metropolitan Edison Co., supra* (state did not authorize turnoffs, so no state action). See *Denver Welfare Rights Organization v. PUC*, 547 P.2d 239, 244 (S. Ct. Colo. 1976) (*en banc*) (distinguishing *Jackson*). See also Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 S. Ct. Rev. 221.

[156]It is the difference between proscribed classes of *speech*, and particular *viewpoints* within those classes, which distinguishes this from *Lehman, supra.* That is to say, Shaker Heights could bar political advertising altogether, but once it allowed car cards for Republicans, it would be required, as a First Amendment matter, to sell to Democrats as well.

channel to all opposing viewpoints as well. See, *e.g., Police Dept. of Chicago v. Mosley, supra.*[157]

To permit a utility to disseminate pro-nuclear views would place the state in a position of "favoring" such views over those quite different positions taken by Amici and other environmental and consumer groups. To avoid this problem, the Commission has imposed the ban challenged here, and has done so seeing that ban as less restrictive than the Amici's shared access proposals.[158]

If this Court strikes down the ban, and permits utilities to use bill inserts for the dissemination of their own views, it must order the Commission to enact a shared access scheme consistent with the First Amendment and the Equal Protection clause.

The issue of shared access is both ripe for this Court's consideration, and indeed, constitutionally compelled if the ban is struck down.[159] The Commission clearly has, as it has asserted,[160] the *power* to impose

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[157]In *Mosley*, the state could, presumably, have banned *all* picketing during school hours; to permit labor picketing (which is, almost inevitably, pro-union) was to unreasonably and unconstitutionally *favor* not only a class of speech, but a particular viewpoint over all others.

[158]See discussion of the "least restrictive means" argument at Point I (E), *supra* at pp. 38-39.

[159]See discussion above and at fn. 118, *supra.*

[160]None of the Commission's opinions dealing with the access issue express any doubt about power, but rather about the comparative wisdom, in First Amendment and administrative terms, of employing that power.

and administer an access scheme;[161] if this Court rejects the Commission's ban, it must remand with directions for the Commission to exercise that power.

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[161]This power derives both from the First Amendment and from the New York Public Service Law, particularly those non-discrimination provisions discussed *supra*. The access scheme which the First Amendment would require here would not be prohibited by this Court's decision in *Tornillo, supra*, since that case was very clearly confined to the print press. Compare, *e.g., Red Lion, supra* (scarcity of regulated resource permits access requirements). Further, even if the bill insert mechanism were deemed entirely the "private property" of a utility (which it is not) and the First Amendment rights of the utility were perceived in some way to outweigh those of Amici and all dissenting ratepayors (which they do not), the state still has a compelling *statutory* interest sufficient to require a utility to open up its "private property" to the view of dissenting ratepayors. See *Hudgens v. NLRB, supra* (no First Amendment right in picketers, but NLRB may, pursuant to statute, require their admission). The New York Court of Appeals affirmed this statutory authority, and this Court is bound by that definitive interpretation of state law.

CONCLUSION

For all of the reasons discussed above, the Commission's ban should be upheld and the opinion of the New York Court of Appeals affirmed; or in the alternative, the case should be remanded with instructions to the Commission to impose and administer a scheme of shared access to the bill insert mechanism.

Dated: New York, New York
December 10, 1979

Respectfully submitted,

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Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE SUBMITTED ON BEHALF OF LONG ISLAND LIGHTING COMPANY AS PETITIONER IN 79-629

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Long Island Lighting Company respectfully moves for leave to file the accompanying brief amicus curiae in support of the appellant, Consolidated Edison Company. In support of its application, Long Island Lighting Company shows:

1. Long Island Lighting Company is closely affected by the outcome of this appeal both in its status as a petitioner in a closely related case pending in this Court (79-629) and as a company subject

to the identical regulation at issue herein. The interest of Long Island Lighting Company is discussed in greater detail in the accompanying brief amicus curiae at pp. 1-3.

2. The New York State Public Service Commission, the appellee herein, has consented to the filing of this brief amicus curiae. The appellant has not consented.

3. The brief, which supports the position of appellant, is timely filed.

BURT NEUBORNE

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Interest of Amicus*

Long Island Lighting Company (LILCO) is an investor owned company engaged in the production and supply of natural gas and electricity to con-

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* A motion for leave to file this Brief Amicus Curiae has been filed with the Court.

sumers in Nassau and Suffolk counties, and a small portion of Queens County, in the State of New York. Prior to February 1977, LILCO utilized inserts in its utility bills to communicate with residents of Long Island on issues of public importance ranging from the availability of Federal Food Stamps to the advisability of nuclear power. The regulation of the New York State Public Service Commission at issue in this case directed LILCO to:

> ". . . discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of [LILCO's] position on controversial matters of public policy."

On May 6, 1977, LILCO commenced an action in the United States District Court for the Eastern District of New York seeking declaratory and injunctive relief against the Commission's ban on "controversial" bill inserts.[1] After permitting intervention pursuant to Rule 24(b) by several environmental groups opposing the use of bill inserts discussing nuclear power, the District Court, on March 30, 1979, upheld the constitutionality of the ban on controversial bill inserts but invalidated the ban on promotional advertising of electric heat. (A copy of the District Court's unreported opinion is reproduced as an Appendix to

[1] The Federal action, *Long Island Lighting Company v. New York State Public Service Commission*, 77 Civ. 972, challenged both the ban on "controversial" bill inserts and a related Commission ban on promotional advertising of electricity. This appeal involves only the bill insert issue. The promotional advertising issue is currently before this Court in *Central Hudson Gas & Electric Company v. Public Service Commission*, No. 79-565, appeal pending from 47 N.Y.2d 94, 417 N.Y.S.2d 30 (1979).

this brief.) Both sides appealed to the Second Circuit. Oral argument on both the bill insert issue and the promotional advertising issue was held before a panel of the Second Circuit on October 22, 1979.[2] After this Court noted probable jurisdiction in this case, LILCO, on October 15, 1979, lodged a petition for certiorari prior to judgment with this Court seeking a writ of certiorari on both the bill insert and promotional advertising issues.[3] On November 1, 1979, this Court denied LILCO's application for expedited consideration of its petition for certiorari. LILCO, thus, is directly interested in the outcome of this appeal both as a litigant in a closely related case and as a company subject to the identical restriction at issue herein. Since the restriction at issue in this case impinges directly upon the First Amendment rights of LILCO and LILCO's customers, LILCO submits this brief amicus curiae in the hope that it will prove of assistance to the Court in confronting the serious First Amendment issue raised by the Commission's attempt to act as a benevolent censor. The arguments raised by LILCO in opposition to the Commission's ban are fully applicable to and wholly supportive of Consolidated Edison Company's appeal herein.

[2] The appeals are docketed in the Second Circuit as 79-7374 and 79-7375.

[3] LILCO's petition for certiorari is docketed in this Court as 79-629. A related petition filed by the intervening environmental groups is docketed as 79-595.

Statement of the Case

On February 25, 1977, the New York State Public Service Commission ordered all public utilities in New York State to discontinue the use of bill inserts discussing controversial issues of public policy. Prior to the Commission's order, LILCO, in common with many other utilities in New York, had utilized bill inserts as an economical and effective method of communicating on a broad range of public issues related to its business. Most significantly for LILCO, bill inserts had been used to discuss the view of LILCO's management with respect to the economics and environmental risks of various alternative means of meeting the energy requirements of its customers, including nuclear power to replace the use of imported oil.

LILCO has used bill inserts of varying size and printing complexity. A single sheet bill insert costs approximately $5,000 to print, while more complex folding inserts of up to several sheets conveying a number of messages cost up to $15,000 to print. Since bill inserts do not cause an increase in postage, the sole costs attributable to inserts are printing costs; costs associated with writing and design; and insertion costs. LILCO recognizes that under current Commission rules all such costs must be borne solely by LILCO's shareholders. Accordingly, controversial bill inserts result in no out-of-pocket cost to the consuming public.

In contrast to the cost-efficient nature of bill inserts, modes of communication promising similar efficiency and coverage are far more expensive. The cost of delivering the same insert by house to house canvassing would be between $37,000-$47,000 per delivery. The average cost of a separate mailing to LILCO's customers would be between $84,500-$93,500 per mailing.

Whether the Commission may single out the most efficient and economical method of communicating information on a substantial public issue and seek to impose an absolute ban on its use is the issue posed by this appeal.[4]

Questions Presented

1. May the New York State Public Service Commission prohibit public utilities from utilizing bill inserts paid for by shareholders to disseminate information on controversial matters of public policy?

2. Is the ban on bill inserts discussing "controversial matters of public policy" void for vagueness?

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[4] The District Court engaged in an intensive investigation of factual issues surrounding the use of bill inserts. The data generated by the District Court's insistence upon a careful review of the facts is contained in the Joint Appendix submitted by the parties in the *LILCO* case in connection with the pending Second Circuit appeal. A copy of the Joint Appendix has been lodged with the clerk of the Court. The factual assertions contained in this Statement of the Case are drawn from material contained in the Joint Appendix.

ARGUMENT

I.

The Commission's Attempt to Impose an Absolute Ban on the Use of Bill Inserts Discussing "Controversial Matters of Public Policy" Violates LILCO's Right to Disseminate and the Public's Right to Receive Information on Current Issues of Public Concern.

A. Introductory Statement and Summary of Argument

The Commission has singled out the most convenient and economical method of communication open to LILCO and has banned it when the subject matter of the insert is "controversial". The ban on "controversial" bill inserts, thus, effects a significant reduction in the ability of LILCO to express itself on one of the most significant issues affecting the company and the Long Island community—the most economical and least environmentally damaging means of meeting the energy needs of its customers and reducing LILCO's current 100 per cent dependence upon foreign oil. The constitutionality of such a ban is, of course, hotly disputed by the parties. However, no dispute appears to exist between the parties as to three issues which form the contextual basis for considering the constitutionality of the ban on "controversial" bill inserts.

First, the parties are in agreement that LILCO's desire to disseminate information relevant to the making of informed decisions on issues of public policy is squarely within the protection of the First

Amendment. *First National Bank of Boston v. Belotti,* 435 U.S. 765 (1978). As this Court noted in *First National Bank,* the First Amendment protects communications as well as communicators; listeners as well as speakers. Since LILCO's proposed speech seeks to address current political and social issues of central importance, it falls at the core of the First Amendment. *Friedman v. Rogers,* 99 S.Ct. 887, 895, n.10 (1979).[5]

Second, the parties recognize that under current Commission guidelines, all out-of-pocket costs attributable to bill inserts discussing "controversial matters of public policy" must be borne solely by public util-

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[5] The principle that the right to know is a corollary of the right to speak has been vigorously asserted by this Court. E.g., Note, *The Right to Know in First Amendment Analysis,* 57 Texas L. Rev. 505 (1979). Indeed, the recognition that corporate and commercial speech is entitled to a degree of First Amendment protection reflects increased concern for the rights of hearers. E.g., *Bigelow v. Virginia,* 421 U.S. 809 (1975); *Virginia State Board of Pharmacy v. Virginia Citizens' Consumers Council,* 425 U.S. 748 (1976); *Linmark Associates v. Township of Willingboro,* 431 U.S. 85 (1977); *Carey v. Population Services, Inc.,* 431 U.S. 678 (1977); *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977); *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978); *Friedman v. Rogers,* 99 S.Ct. 887 (1979). The explicit recognition by this Court that the First Amendment protects the right to receive information as well as the right to disseminate it dates from *Martin v. Struthers,* 319 U.S. 141 (1943), when this Court invalidated a flat ban on house to house canvassing because it interfered with the right of a willing householder to receive information. See also, *Lamont v. Postmaster General,* 381 U.S. 301 (1965); *Procunier v. Martinez,* 416 U.S. 396 (1974). No serious question exists concerning the standing of a speaker to raise the First Amendment rights of his putative listeners. E.g., *First National Bank of Boston v. Bellotti, supra.*

ity shareholders. Thus, the dissemination of "controversial" bill inserts cannot result in increased cost to the consuming public.

Finally, the parties are in agreement that bill inserts provide a highly effective method of communicating with a public utility's customers. Thus, in 1976, the Commission directed public utilities in New York State to use bill inserts rather than newspaper advertisements to notify consumers of prospective rate changes. See, *Petition of Consumer Protection Board,* N.Y.S. Public Service Commission Case 26972 at 5-6 (Aug. 10, 1976).

Despite the conceded application of the First Amendment to LILCO's speech; despite the willingness of LILCO to bear all costs attributable to its speech; and despite the Commission's recognition that bill inserts are a significant and effective medium of communication, the Commission has, nevertheless, insisted upon imposing an absolute ban on controversial bill inserts. The Commission seeks to justify its absolute ban by asserting two sets of objections to "controversial" bill inserts. First, the Commission argues under several rubrics that controversial bill inserts impinge upon the privacy interests of those who receive them.[6] Second, the Commission argues that a ban on controversial bill inserts is necessary to equalize speech resources and to prevent an unfair

[6] Among the privacy-based objections raised by the Commission are (1) protection against offensive messages; (2) protection of a captive audience; and (3) protection of the tranquility of the home. The inadequacy of the Commission's privacy-based objections are discussed *infra* at pp. 9-20.

subsidization of a utility's views. Given the paramount importance of First Amendment values, the Commission's objections to "controversial" bill inserts, taken separately or in combination, do not justify the Commission's absolute prohibition. Moreover, even if one were to assume the validity of one or more objections, the Commission's choice of an absolute prohibition is far more Draconian than necessary.

B. The Inadequacy of the Governmental Interests Proffered by the Commission in Defense of Its Absolute Prohibition

1. Privacy-Based Interests

Rather than adopting the traditional posture of encouraging the flow of information relevant to the functioning of a free society, the Commission argues that New Yorkers should be shielded from potentially upsetting controversial information with which they may disagree. Despite the fact that bill inserts do nothing more than express an idea and despite the fact that recipients are free to discard them unread, the Commission argues that New Yorkers must be protected against unwelcome ideas by banning them from utility billing envelopes. This Court has repeatedly rebuffed similar governmental attempts to insulate persons from the marketplace of ideas under amorphous notions of privacy.

(a) The Shielding of Persons from Ideas Which They Might Find Offensive

The Commission's primary stated justification for the banning of bill inserts is its desire to shield certain New Yorkers from ideas with which the Com-

mission assumes they disagree and would find offensive.[7] While such a motive for censorship is not new, it has been repeatedly rejected by this Court as in basic conflict with the First Amendment.

In *Street v. New York,* 394 U.S. 576 (1969), New York attempted to prosecute a defendant for uttering contemptuous words in public about the American flag. New York attempted to justify its suppression of speech contemptuous of the flag by arguing that defendant's words were deeply offensive to passers-by. However, Mr. Justice Harlan, writing for the Court, disposed of such a proffered state interest by noting:

> "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Id.* at 592.

Similarly, in *Cohen v. California,* 403 U.S. 15 (1971), this Court, once again speaking through Mr. Justice Harlan, declined to permit California to pros-

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[7] Thus, the Commission's February 25, 1977 Statement of Policy notes:

> ". . . we shall not permit advertising on matters of public controversy to be included in the printed material that often accompanies the mailing of consumer bills. We believe that using bill inserts to proclaim a utility's viewpoint on controversial issues (even when the stockholder pays for it in full) is tantamount to taking advantage of a captive audience, since the consumer cannot avoid receiving the literature with the utility's message. Regardless of whether consumers read the material, it is basically unfair to subject rate payers who disagree with the utility's viewpoint to the arguments of the utility through its billing mechanism." *Statement of Policy* at pp. 10-11.

ecute a young man for appearing in a courtroom wearing a jacket emblazoned with an offensive slogan merely because persons involuntarily viewing the slogan were extremely likely to be offended by its vulgarity.

Mr. Justice Harlan's admonition that communication may not be suppressed in a free society merely because it may (or, as in the case of *Cohen,* would probably) be offensive to its hearers has been repeatedly heeded by this Court. In *Erznoznik v. City of Jacksonville,* 422 U.S. 205 (1975), this Court declined to ban sexually explicit (but nonobscene) drive-in movies merely because they were visible and, presumably, offensive to many passers-by. In *Gooding v. Wilson,* 405 U.S. 518 (1972), this Court invalidated a Georgia statute on its face which was "susceptible of application to speech, although vulgar or offensive, that is protected by the First and Fourteenth Amendments . . ." *Id.* at 520. In *Bachellar v. Maryland,* 397 U.S. 564 (1970), this Court unanimously reversed a disorderly conduct conviction because the record indicated that the conviction might have resulted merely because petitioners' views were offensive to some of their hearers. See also, *Rosenfeld v. New Jersey,* 408 U.S. 901 (1972); *Lewis v. New Orleans,* 408 U.S. 913 (1972); and *Brown v. Oklahoma,* 408 U.S. 914 (1972) (reversing convictions for "offensive" speech); *Lewis v. New Orleans,* 415 U.S. 130 (1974) (invalidating ban on offensive speech); *Plummer v. City of Columbus,* 414 U.S. 2 (1973) (reversing conviction for offensive speech under broadly worded statute); *Cason v. City of Columbus,* 409 U.S. 1053 (1972); *Karlan v. City of Cincinnati,* 416 U.S. 919 (1974); *Kelly v. Ohio,* 416 U.S. 923 (1974);

Rosen v. California, 416 U.S. 924 (1974) (reversing a series of convictions based on speech offensive to hearers). Finally, in *Spence v. Washington*, 418 U.S. 405 (1974), this Court returned to Mr. Justice Harlan's formulation in *Street* and reversed a conviction for placing a peace symbol on an American flag, despite Washington's assertion that such activity was extremely offensive to persons who viewed it.

This Court's consistent refusal to permit the State to suppress communication merely because the ideas conveyed might offend some hearers is not surprising. If speech may be suppressed merely because some listeners might find it offensive, only the lowest common denominator of communication would exist. Instead of the robust exchange of views, we would be consigned to a bland diet of platitudes. Thus, to the extent the ban on bill inserts is predicated on protecting certain hyper-sensitive hearers from ideas which they might find offensive, it is in clear violation of the First Amendment.

(b) The Protection of Privacy in the Home

The Commission will doubtless contend that its absolute ban on "controversial" bill inserts is not designed merely to shield persons from offensive ideas, but rather to guard the privacy of the home from the intrusion of unwelcome ideas. However, whatever power the State may possess to protect the tranquility of the home from inherently obtrusive or inherently "offensive" communications, it does not extend to the banning of core First Amendment activity which is deemed unwelcome merely because the recipient disagrees with the ideas expressed. While

the State may protect the privacy of the home against unduly obtrusive forms of communication and inherently offensive communication, it may not erect a barrier against communications directed to the home merely because they discuss controversial ideas. Thus, while the State may regulate sound trucks and blatantly offensive sexual pictorial matter in order to preserve the tranquility of the home, the State may not act to insulate the home from the realm of ideas. While a regulation controlling the delivery of an unsolicited, sexually explicit picture to one's home may well be constitutional, a regulation forbidding Republicans from mailing campaign literature to registered Democrats would violate the First Amendment. Compare, *Rowan v. United States Post Office Department*, 397 U.S. 728 (1970) with *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

Moreover, even if one concedes a valid interest in protecting the privacy of the home against controversial ideas,[8] the decision as to whether a given communication is to be received at home is an individual decision which may not be pre-empted by even a benevolent censor.[9]

(i) The Commission May Not Impose a Ban on the House to House Dissemination of Communications Discussing Controversial Matters of Public Policy

This Court has recognized that no person should be a captive audience in her or his own home for

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[8] Amicus urges the Court to reject such a position as inconsistent with the notions of robust debate underlying the First Amendment.

[9] See, *infra*, pp. 17-20.

communications which because of their form and/or substance are inherently destructive of tranquility. E.g., *Rowan v. United States Post Office Department,* 397 U.S. 728 (1970). Thus, for example, the State undoubtedly possesses power to regulate certain methods of communication (such as sound trucks) which because of their form inexorably affect the tranquility of the home. E.g., *Saia v. New York,* 334 U.S. 558 (1948). Moreover, the State possesses limited power to regulate the home delivery of inherently offensive material, such as sexually explicit pictorial matter, which, while not obscene, is deeply disturbing to many persons. Compare, *Rowan v. United States Post Office Department,* 397 U.S. 728 (1970) with *Blount v. Rizzi,* 400 U.S. 410 (1971). However, it is a dramatic leap from the recognition of a limited capacity to regulate inherently obtrusive communication in the home to the broad power, asserted by the Commission, to ban non-offensive, minimally obtrusive communications merely because some recipients may disagree with the ideas they espouse. This Court has repeatedly recognized that when the content of the communication is not inherently offensive and where the form of the communication is not inherently obtrusive, the fact that a communication is delivered to a recipient's home does not strip it of constitutional protection. E.g., *Hynes v. Borough of Oradell,* 425 U.S. 610 (1976).

In *Hynes,* this Court struck down as unconstitutionally vague a licensing requirement directed at persons seeking to engage in house to house political canvassing. While the *Hynes* court recognized that door to door canvassing might be subject to appropriately narrow regulation because of the physical intrusion involved, the Court clearly held that house to house canvassing could not be absolutely prohibited. Similarly, the Commission lacks power to impose an absolute ban on the far less intrusive delivery of mail inserts at issue in this case, merely because they are directed to the home.

In recognizing that the delivery of non-offensive communications to the home in a non-obtrusive manner is protected by the First Amendment, the *Hynes* Court merely re-affirmed an ubroken line of precedent recognizing that house to house delivery of information is a significant First Amendment activity. Thus, in *Martin v. Struthers,* 319 U.S. 141 (1943), Mr. Justice Black phrased the issue in words particularly appropriate to the instant case:

> "For centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the occupants. . . . Whether such visiting shall be permitted has in general been deemed to depend upon the will of the individual master of each household, and not upon the determination of the community. In the instant case, the City of Struthers, Ohio, has attempted to make this decision for all its inhabitants. The question to be decided is whether the City, consistently with the federal Constitution's guarantee of free speech and press, possesses this power." 319 U.S. at 141-142.

In holding an absolute ban on door to door communication invalid, Mr. Justice Black, writing for the Court, noted:

> "Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas." 319 U.S. at 146-147.

In both *Schneider v. State,* 308 U.S. 147 (1939) and *Cantwell v. Connecticut,* 310 U.S. 296 (1940), this Court reversed convictions arising out of house to house First Amendment activity. See also, *Thomas v. Collins,* 323 U.S. 516 (1945); *Lovell v. Griffin,* 303 U.S. 444 (1938).

In each of the door to door cases from *Schneider* to *Martin* to *Hynes,* the physical presence of the canvasser in the doorway of a private home constituted a far greater intrusion and threat to privacy than does the insert in an envelope which the Commission seeks to ban. If, as *Hynes* and *Martin v. Struthers* make clear, LILCO would be constitutionally free to engage in a house to house canvass to deliver its message, it defies reason to suggest that the Commission may, in the guise of protecting privacy, prohibit LILCO from delivering the identical message by using the less intrusive and more economical method of mail inserts.

Just as the recipient of a house to house canvass in *Hynes* or *Martin* may decline to receive or to read a leaflet, so the recipients of LILCO's inserts are free to discard them unread. Indeed, the ability of an unwilling recipient to ignore the mail insert at issue in this case is substantially greater than the ability to ignore a physical presence in the doorway.[10] Thus, the Commission's attempt to justify its ban on mail inserts as a device to protect the privacy of the home from unwelcome ideas must fail.

(ii) The Commission May Not Interfere With the Right of Willing Recipients to Receive Information on Controversial Matters of Public Policy

In banning "controversial" mail inserts, the Commission has, in the words of Mr. Justice Black in *Martin v. Struthers, supra,* attempted to decide for the entire community whether individuals within that community may receive the information in question. Even if one assumes that a valid governmental interest exists in insulating persons from inoffensive and nonobtrusive communications with which they disagree, the decision to insulate must remain an individual decision which may not be imposed upon the entire population. Even if individual members of the community might be empowered to cut themselves off from unwelcome ideas, the Commission lacks the

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[10] Unlike the matter at issue in *Rowan v. United States Post Office,* 397 U.S. 728 (1970), the mail inserts disseminated by LILCO are neither inherently offensive nor unduly obtrusive. While a recipient of sexually explicit pictorial matter in the mail may find it impossible to avoid being confronted with an offensive message, the recipient of a mail insert discussing the merits of important, but controversial issues, e.g. nuclear power need merely refrain from reading the insert to avoid any contact with unwelcome ideas.

power to decide, in advance, that all New Yorkers do not wish to receive the information at issue in this case. Thus, even if one assumes that *Rowan v. United States Post Office,* 397 U.S. 728 (1970) applies not merely to inherently offensive communications but to core First Amendment material as well, the Commission's order cannot withstand constitutional scrutiny. In *Rowan,* this Court upheld the constitutionality of a statute which permitted the addressee of sexually oriented (but non-obscene) mailings to require that her or his name be removed from future mailing lists. The heart of the *Rowan* decision was the choice it permitted each individual addressee to make his own decision whether to receive future mailings. *Rowan* is, thus, merely a logical application of Mr. Justice Black's insistence in *Martin v. Struthers, supra,* that the decision whether to receive information in the home is the sole province of the individual. The Commission's attempt to pre-empt that individual decision by imposing a blanket prohibition on all controversial bill inserts is its most glaring constitutional error.

In *Lamont v. Postmaster General,* 381 U.S. 301 (1965), this Court invalidated a postal regulation which required the addressee of "communist propaganda" to affirmatively request its delivery. The ostensible purpose of the regulation invalidated in *Lamont* was to shield addressees from unwanted "offensive" mail. However, the *Lamont* court held that by requiring an affirmative request prior to delivery, the regulation imposed an unconstitutional restraint on the public's right to know. The Commission's total ban on controversial mail inserts appears

to be even more objectionable than the partial restraint struck down in *Lamont.* See also, *Blount v. Rizzi,* 400 U.S. 410 (1971) (invalidating an attempt to vest the Postmaster General with powers similar to that accorded individual addressees in *Rowan*).

The distinction between an individual choice to cease receiving mailed matter and a governmentally imposed prohibition similar to the Commission's flat ban has been recognized by numerous lower courts. Thus, in *United States v. Treatman,* 408 F. Supp. 944 (C.D. Cal. 1976), the District Court ruled that while individuals could prevent unwelcome mailings of sexually explicit (non-obscene) material to themselves, the government lacked power to block the mailing of constitutionally protected material to persons who had not explicitly demanded that the mailings be terminated. In *Bolles v. People,* 541 P.2d 80 (1975) (Colo.), the Supreme Court of Colorado recognized that the mailing of pictorial matter opposing abortion was protected by the First Amendment in the absence of individual requests to be removed from the mailing list. Finally, in *Van Nuys Publishing Co. v. City of Thousand Oaks,* 97 Cal. Rptr. 777, 489 P.2d 809 (1971), the Supreme Court of California struck down an ordinance barring house to house canvassing, holding:

> "The ordinance . . . goes considerably beyond a homeowner's individual choice, since it prohibits distribution to those occupants who have raised no objection as well as to those who have." 489 P.2d at 814.

The Commission's ban similarly goes considerably beyond individual choice, since it prohibits dissemina-

tion of controversial bill inserts to all persons, not merely to persons who have explicitly requested that they not receive the material. As Mr. Justice Black noted in *Martin v. Struthers, supra,* such a stringent, overly broad ban is not a legitimate tool for the protection of privacy; but rather a "naked restriction of the dissemination of ideas." 319 U.S. at 147.

2. Equality-Based Interests

The Commission, apparently recognizing that the privacy-based justifications set forth in its initial *Statement of Policy* are of doubtful constitutional validity, also seeks to justify the absolute ban on controversial bill inserts as a device to prevent public utilities from gaining an unfair advantage in disseminating their views. In effect, the Commission has chosen to seek to "equalize" speech resources by denying one speaker access to an effective method of communication.

(a) Equalization of Speech Resources

It has, recently, become fashionable to tamper with our traditional free market in ideas in the hope of assuring that all points of view enjoy equal access to the marketplace. Thus, in recent years, states have experimented with statutes granting a right of reply to press attacks,[11] the Federal government has experimented with controls on political expenditures and

[11] E.g., Miss. Code Ann. § 23-3-35 (1972) (Mississippi); Florida Statute § 104.38. See also, § 61 Nev. Rev. Stat. § 6826 (1912) repealed, ch. 310, § 10, Nev. Stat. 554 (1969). See generally, *Miami Herald Publishing Company v. Tornillo,* 418 U.S. 241 (1974).

contributions[12] and the Federal Communications Commission has experimented with access to the electronic media.[13] In each context, an alleged imbalance in the marketplace of ideas was subject to correction by two potential contrasting approaches—amplification of the "weak" voices or suppression of the "strong" ones. In each context, both the regulatory bodies and the Courts have recognized that, to the extent any tampering with the marketplace is constitutional at all, it must take the form of "amplification" rather than "suppression."

Thus, in the context of press-reply statutes and access to electronic media, no suggestion was even advanced that the media refrain from speaking; merely that an attacked party be given a forum for response or that alternative views be permitted an airing.[14]

In the campaign finance area, however, the initial response of Congress was similar to the Commission's approach herein. Confronted with a purported imbal-

[12] *Buckley v. Valeo,* 424 U.S. 1 (1976).

[13] *Columbia Broadcasting System v. Democratic National Committee,* 412 U.S. 94 (1973); *Red Lion Broadcasting Co. v. Federal Communications Commission,* 395 U.S. 367 (1969). See also, *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974). (No right of access to municipal transit advertising.) See also, *Midwest Video Corp. v. F.C.C.,* 99 S.Ct. 1435 (1979).

[14] As *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974), *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974) and *Columbia Broadcasting System v. Democratic National Committee,* 412 U.S. 94 (1973) demonstrate, the "amplification" device is, itself, often impermissible. Since the Commission has not attempted such an "amplification" approach, amicus suggests that it would be premature to consider its legality in depth at this time. See, *infra,* at pp 33-36.

ance in the ability to communicate during an election campaign, Congress singled out the "strong" voices and sought to redress the imbalance by muting them.[15] In invalidating the imposition of expenditure ceilings in political campaigns, this Court emphatically rejected the notion that speech imbalance may be redressed by imposing direct restraints on communication. Thus, the *Buckley* court held:

> "It is argued . . . that an ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of candidates imposed by § 608(3)1's expenditure ceiling. *But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment,* which was designed 'to secure "the widest possible dissemination of information from diverse and antagonistic sources" and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people"'." *Id.* at 48-49. (Emphasis added.)

[15] Specifically, Congress sought to restrict the amount which an individual or candidate might expend on a given election campaign. The expenditure limitations were explicitly predicated on a desire to "equalize" the ability to communicate during the campaign process. Thus, this Court noted in *Buckley:*

> Although the Act does not focus on the ideas expressed by persons or groups subjected to its regulations, it is aimed in part at equalizing the relative ability of all voters to affect electoral outcomes by placing a ceiling on expenditures for political expression by citizens and groups. *Buckley v. Valeo,* 424 U.S. 1, 17 (1976).

See also, *Id.* at 49 n. 55, at which the *Buckley* court notes:

> "Neither the voting rights cases nor the Court's decisions upholding the Federal Communication Commission's fairness doctrine, lends support to appellees' position that the First Amendment permits Congress to abridge the rights of some persons to engage in political expression in order to enhance the relative voice of other segments of our society."

Thus, to the extent the Commission seeks to uphold the direct restraint upon LILCO's speech "in order to enhance the relative voice of other segments of our society", it is in clear violation of the First Amendment. Whatever power the Commission may have to "amplify" what it perceives as weak voices, *Buckley* renders it clear that the Commission may not pursue its policy of "equalizing" speech by suppressing what it perceives as "strong" ones.

(b) Avoidance of a Forced Subsidy

It is conceded that under current Commission regulations all expenses fairly attributable to the use of "controversial" bill inserts must be borne by shareholders rather than rate payers.[16] Moreover, it is con-

[16] In the Second Circuit, the Commission launched a curious argument that its historic insistence upon distinguishing between "above the line" expenses, which qualify in computing future rates, and "below the line" expenses, which do not, is a meaningless exercise. The Commission argued that even "below the line" expenses may eventually have an impact upon future rate making, since they restrict the ability of shareholders to

ceded that the Commission may allocate salary and related expenses attributable to the use of bill inserts to shareholders rather than rate payers. Finally, it is conceded that bill inserts do not increase postage charges or result in any other increase in the cost of the billing process. Despite LILCO's willingness to bear all economic costs causally related to the use of bill inserts, the Commission asserts that the use of bill inserts would force dissenting consumers to subsidize the dissemination of views with which they vigorously disagree. However, given LILCO's willingness to absorb the cost of bill inserts, no forced subsidy exists. Moreover, even if a subsidy existed (it does not), it is a constitutional non-sequitur to suggest that the existence of a dissenting minority requires the cessation of all speech with which they disagree.

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earn the return to which the Commission has said they are entitled. Such a concern has not previously inhibited the Commission from charging certain expenses, such as lobbying, to shareholders when it deems it appropriate. The answer to the Commission's highly self-critical attack on its historic basis for rate regulation is twofold. First while the existence of enormous "below the line" expenses might seriously affect the rights of shareholders, the relatively small sums involved in this case cannot possibly affect future rate making computations. Second, the Commission's argument proves far too much. If one takes the Commission seriously, rate payers ultimately pay for all of LILCO's speech, not merely bill inserts. Accordingly, under the Commission's rationale, LILCO would not be permitted to engage in any First Amendment activity. Not even the Commission urges such a result. Accordingly, the current Commission structure which disqualifies controversial bill insert expenses in rate making computations is an effective method of assuring that shareholders, not rate payers, pay for "controversial" bill inserts.

(i) There is No Forced Subsidy Inherent in the Use of Bill Inserts

Given the fact that bill inserts impose no additional economic burden on LILCO rate payers, the Commission appears to concede that the traditional form of forced subsidy—involving a compelled payment of money—is not present. Instead, the Commission seeks to stretch the salutory rule against state-imposed forced subsidies to include situations where no economic detriment exists, but a cost-free indirect benefit accrues to a speaker. Such an attempt to launch courts on a limitless search for indirect benefits or "free rides" devoid of economic consequence is supported by neither precedent nor policy.

LILCO has no quarrel with the proposition that the state may not compel any person to subsidize political activity with which he or she disagrees. *Abood v. District Board of Education*, 431 U.S. 209 (1977). A similar principle has long insulated Americans from being required by the state to subsidize religious activities. E.g., *Flast v. Cohen*, 392 U.S. 83 (1968). However, no case has ever found a forbidden subsidy in the absence of a tangible out of pocket cost to the complaining party. Nevertheless, the Commission urges this Court to recognize a forced subsidy in the absence of economic cost on the basis of "intangible" benefit. A moment's reflection reveals the danger to a robust First Amendment inherent in the expanded vision of subsidy urged by the Commission. Under such a standard, no aggregate entity would ever be free to speak since dissenting members of the entity would be deemed to have intangibly subsidized the speech. For example, tax exempt

organizations would not be free to engage in First Amendment activity, since dissenting taxpayers would have indirectly subsidized the speech. Similarly, O.E.O. anti-poverty agencies, which receive their funds from the government, would not be permitted to speak, since dissenting taxpayers would be subsidizing the speech. Finally, in the context of *Abood,* volunteers would not be permitted to assemble at union headquarters to use typewriters and mimeograph facilities, since dissenting members would have "subsidized" the purchase of the equipment. Thus, a requirement that a causal connection exist between an alleged subsidy and a net economic cost is necessary to prevent the concept of forced subsidy from threatening the robust exercise of First Amendment rights. Indeed, in the related area of the Establishment Clause, this Court has rejected the notion that all aid to a religious institution constitutes a forbidden forced subsidy. Thus, in *Walz v. Tax Commission,* 397 U.S. 664 (1970), this Court rejected the argument that the grant of tax exemptions to religious organizations forced dissenting taxpayers to "subsidize" religion in violation of the Establishment Clause. In *Walz,* the concept of forced subsidy was rejected despite the arguable existence of a tangible out of pocket cost. In this case, where no tangible out of pocket cost exists, it is even clearer that a search for indirect or intangible subsidies would improperly entangle courts in sensitive areas of free expression.

While *Abood* stands as a laudable protection against forced out-of-pocket subsidies, the Commission's attempt to invite courts to use *Abood* to censor speech under the vague and amorphous standard of "indirect benefit" is unacceptable.[17]

(ii) Enforced Silence Is Not the Remedy for a Forced Subsidy

LILCO vigorously disputes the existence of any subsidy in connection with the bill insert process. However, even if one assumes *arguendo* that a form of intangible subsidy exists, it does not follow that LILCO must refrain from using bill inserts. It is a constitutional non-sequitur to argue that because a minority objects to a forced subsidy, the majority must be deprived of the speech in question. As even the Commission concedes, it is obliged to adopt the least drastic remedy. Obviously, a flat ban on the speech in question is not the least drastic remedy.

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[17] An additional basis for rejecting the forced subsidy theory is the fact that the forced subsidy cases inevitably involve state action. Private entities cannot impose a forced subsidy in violation of the First Amendment. *The Civil Rights Cases,* 109 U.S. 3 (1883). This Court has carefully distinguished between privately owned utilities, such as LILCO, the actions of which are not deemed "state action", and publicly owned utilities. Compare, *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345 (1974) with *Memphis Light, Gas & Water Division v. Craft,* 436 U.S. 1 (1978).

Moreover, the Commission's attempt to finesse the state action problem by arguing that Commission toleration of bill inserts would constitute state action is unavailing. The assumption that LILCO uses bill inserts only because the Commission permits it to begs the very constitutional question at issue in this case. If the First Amendment protects LILCO's use of bill inserts, the Commission's redundant "permission" does not translate into state action. This Court has now made clear that mere state authorization of an activity does not render its performance "state action." *Flagg Bros. v. Brooks,* 98 S.Ct. 1729 (1978).

As with the privacy-based objections discussed *supra* at pp. 9-20, the Commission does not appear genuinely concerned with eliminating the (non-existent) subsidy. Rather, the Commission seems bent on using the alleged existence of subsidy-based or privacy-based objections to justify blanket suppression of the speech in question. Instead of proposing narrowly tailored remedies designed to protect the interests of the dissenting minority, the Commission seeks improperly to use the alleged interests of dissenting rate payers to justify a cut-off of speech to all.

C. The Absolute Ban on Controversial Bill Inserts May Not Be Justified By the Commission's Desire to Avoid Administrative Inconvenience Caused By the Possible Emergence of a Public Forum

The District Court in the LILCO case quite properly declined to hold that the privacy-based and equality-based interests discussed *supra* justified an absolute ban on controversial inserts. Instead, the District Court elected to rest its approval of the insert ban on the Commission's apparent desire to prevent the emergence of a public forum in the bill insert process—with its concomitant administrative complexities. In effect, therefore, the District Court permitted the Commission to ban bill inserts because the Commission is unwilling or unable to confront the problems of administering an arguably public forum. Such an "administrative convenience" rationale for an absolute prohibition on controversial bill inserts must be rejected on at least two levels. First, use of "controversial" bill inserts would not create a public forum in the billing process and,

thus, would not give rise to an obligation to provide access to the billing mechanism to opposing groups.[18] Second, and more importantly for the purposes of this appeal, even if continued use of bill inserts would result in the emergence of a public forum, the Commission may not silence LILCO merely to avoid the inconvenience of administering a public forum.

(1) The Commission May Not Suppress Speech to Prevent the Emergence of a Public Forum

The District Court relied upon *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974) as sole authority for the proposition that the government, in order to prevent emergence of a public forum, may forbid a property owner from using his property to express an idea. However, far from justifying the Commission's absolute ban, *Lehman* demonstrates its invalidity. In *Lehman,* a transit system declined to permit its property to be used to display political advertising, despite having routinely accepted commercial displays. Plaintiffs unsuccessfully argued that by accepting commercial displays, the transit system had obligated itself to accept political advertising as well. *Lehman* involved an unsuccessful attempt by a puta-

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[18] The Commission has never taken a position on whether use of bill inserts by public utilities creates a public forum with a right of shared access. Rather than confront such a concededly difficult issue, the Commission has chosen to ban "controversial" bill inserts altogether. Since the Commission has never seriously considered a shared access plan involving bill inserts, the extent to which the First Amendment compels or precludes such a plan is beyond the scope of this appeal. This issue is preliminarily addressed *infra.*

tive speaker to compel an *unwilling* property owner to permit its premises to be used for speech. In holding that the First Amendment rights of the putative speaker do not override the traditional property interest of the unwilling defendant, the plurality in *Lehman* sounded a familiar theme of this Court. E.g., *Columbia Broadcasting System v. Democratic National Committee,* 412 U.S. 94 (1973); *Lloyd Corp. v. Tanner,* 407 U.S. 551 (1972). See also, *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974); *Wooley v. Maynard,* 430 U.S. 705 (1977). However, in the present case, the putative speaker *is* the property owner. No case can be cited for the proposition that the state may forbid a *willing* property owner from using its property to express ideas merely because expression may cause the emergence of a public forum. Indeed, this Court has repeatedly held that when a *willing* property owner wishes to devote its property to a communicative use, the State is precluded by both the First and the Fourteenth Amendments from imposing absolute prohibitions on the speech in question. E.g., *Spence v. Washington,* 418 U.S. 405 (1974) (communicative use of privately owned flag protected); *Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85 (1977) (For sale sign on private property protected); *First National Bank of Boston v. Bellotti, 435* U.S. 765 (1978) (use of corporate property to express ideas protected); *Buckley v. Valeo,* 424 U.S. 1 (1976) (use of private funds protected). While *Lehman* may fairly be cited for the proposition that an *unwilling* property owner may not be required to act as a conscript speaker, it cannot stand as authority for the proposition that a *willing* property owner may be forbidden to speak. Thus, even if the use of bill inserts were to

pose an increased administrative burden for the Commission, the First Amendment forbids the Commission from silencing LILCO merely because the Commission is unable or unwilling to cope with the task of administering a public forum.

(2) The Use of Bill Inserts Would Not Create a Public Forum

Strictly speaking, the question of whether the use of bill inserts would create a public forum entitling third persons to insist upon shared access to the billing process is not before the Court. Nevertheless, the District Court's decision assumed that continued use of bill inserts by public utilities might give rise to an enforceable right to shared access to the bill insert process. As LILCO has argued, even if such an assumption were correct, it cannot justify a total ban on controversial bill inserts. Accordingly, the Court of Appeal's decision upholding the total ban may (and should) be reversed without the necessity of deciding the public forum-shared access issue. Despite the failure of the Commission to have considered the question, the Court, nevertheless, may be urged to issue an advisory dictum directing that a variant of the "fairness doctrine" be applied to bill inserts. The shared access question is, however, not ripe for judicial consideration. Moreover, serious factual issues exist which must be resolved as a pre-condition to considering the imposition of shared access. Finally, as a matter of law, the Commission lacks the power to order a public utility to disseminate a "controversial" message with which it disagrees.

(i) The Shared Access Issue Is Not Ripe for Adjudication

The Commission has never considered the extremely complex and difficult issue of the extent to which doctrines evolved in the context of the electronic media should apply to communications by public utilities. In recent years, attempts to expand notions of equal time and shared access have been firmly rejected by this Court. E.g. *Miami Herald Publishing Company v. Tornillo,* 418 U.S. 241 (1974) (right of reply statute unconstitutional); *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974) (no right of access to municipal transit advertising); *Columbia Broadcasting System v. Democratic National Committee,* 412 U.S. 94 (1973) (no right to buy commercial time); *Buckley v. Valeo,* 424 U.S. 1 (1976). See also, *Midwest Video Corp. v. F.C.C.,* 99 S.Ct. 1435 (1979). Given the recent decisions of this Court, serious doubt exists whether the Commission would possess the power to impose a form of shared access upon LILCO. However, no doubt exists that if such a drastic step is contemplated, proper procedure calls for the issue to be presented initially to the Commission, with judicial review occurring only *after* the Commission has acted or failed to act. Only a proceeding before the Commission is calculated to develop the factual issues and identify the conflicting policy factors which must be weighed, both by the Commission and by a reviewing Court. If this Court strikes down the absolute ban on bill inserts, the Commission will doubtless consider the question of shared access. Until the Commission is encouraged to deal initially with the matter and to formulate an administrative position, it would be unwisely premature and jurisdictionally questionable for this Court to consider the issue.[19]

(ii) Substantial Doubt Exists as to the Power of the Commission to Impose Shared Access

Although it is premature to speculate on the legal merits of a shared access plan which the Commission has never even considered—much less promulgated—serious doubt exists as to whether the government may require LILCO to use its property to disseminate views with which it profoundly disagrees. In *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974), this Court invalidated an attempt to require the only newspaper in town to print a reply to an editorial attack on a given individual. As the Court noted, the First Amendment bars the State from requiring individuals to disseminate material with which they disagree. In *Wooley v. Maynard,* 430 U.S. 705 (1977), Chief Justice Burger noted that "the right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind'". [Citing *Board of Education v. Barnette,* 319 U.S. 624, 637 (1943).] Where, as here, the resources of a private company would be commandeered by the State in order to compel the dissemination of a message with which the private party disagrees, the

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[19] Until the Commission acts, any speculation by this Court concerning shared access might well constitute an advisory opinion beyond the Article III jurisdiction of the Court. Moreover, whatever the Article III power of the Court, it is scarcely a novel proposition that difficult issues of constitutional magnitude should be determined only when necessary to resolve an actual case or controversy.

most profound issues of "freedom of mind" arise. Indeed, a forbidden subsidy, which the Commission so roundly deplores, would be imposed in its most blatant form, since LILCO would, in effect, be required to subsidize its opponents' messages by including them in its billing process. Cf. *Abood v. District Board of Education*, 431 U.S. 209 (1977). In the absence of the special circumstances created by the electronic media, this Court has studiously avoided any expansion of the principle of forced access. E.g., *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974); *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94 (1973). The caution demonstrated by this Court in *Tornillo* and *Lehman* together with this Court's unequivocal direction in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) that public utilities are to be treated as private rather than state entities, raise serious doubts concerning the Commission's power to order shared access to LILCO's billing envelopes. The resolution of those doubts should await a proper case or controversy.

D. ***The Absolute Ban on "Controversial" Bill Inserts May Not Be Upheld as a "Time, Place or Manner" Restriction on Speech.***

Although candidly noting that precedent does not fully support the position, the District Court and the Commission have struggled heroically to justify the Commission's ban on controversial bill inserts as a permissible "time, place or manner" restriction on First Amendment activity. The obvious discomfort felt by the District Court in seeking to apply "time, place or manner" analysis to the Commission's con-

tent defined ban is understandable, since no case has ever sustained an absolute content-based prohibition on a significant mode of communication as a mere "time, place or manner" restriction. Instead, the "time, place or manner" analysis has been used to regulate the inevitable collision between substantial state interests and certain modes of speech which involve broad elements of non-verbal activity.

All communicative activity, verbal as well as non-verbal, may be viewed as a two-step process consisting, first, of the transmission of an idea and, second, of the generation of non-communication related by-products. Thus, for example, picketing or demonstrating are two-step processes involving both idea transmission and the physical occupation of space. Since the non-communication related by-product of certain modes of speech (often described as communicative conduct) is substantial, the "time, place or manner" analysis has provided the state with a framework within which to regulate the non-communication related by-products of certain modes of speech. Thus, picketing, demonstrating and other forms of conduct-related communication are subject to substantial governmental regulation under the rubric of "time, place or manner" in order to police the inevitable collision between certain non-communication-related by-products of the communicative conduct and substantial governmental interests, such as free passage through the streets. However, certain other modes of speech (often called "pure speech") generate no by-products apart from the transmission of an idea. When such "pure speech" modes are used, the state is not free to use the "time, place or manner" doctrine to seek to regulate the communication-related

aspects of the process. Thus, where an act of communication does nothing more than transmit an idea, the state may not, under the guise of a "time, place or manner" restriction, seek to prohibit it. The transmission of an insert in an envelope is a pure communicative exercise. It generates no non-communication related by-products.[20] Thus, while the state may, if it wishes, seek to justify a ban on LILCO's communication under traditional First Amendment doctrine, it may not seek to regulate the communicative aspect of LILCO's speech as a mere "time, place or manner" restriction.

Moreover, even if "time, place or manner" were applicable to content-based regulations, the doctrine has never been used to impose an absolute prohibition upon a significant method of communication. A speaker's choice of the mode of communication is entitled to First Amendment protection. E.g., *Street v. New York*, 394 U.S. 576 (1969); *Cohen v. California*, 403 U.S. 15 (1971). Just as a city would not be empowered to place an absolute ban on "controversial" street demonstrations under the rubric of a "time, place or manner" restriction, so the Commission may not impose an absolute ban on "controversial" bill inserts. As Mr. Justice Harlan noted in both *Street* and *Cohen*, a speaker's choice of the means of communication is fully as protected against government interference as is the substantive content of the message. So long as the method of communication

[20] One possible non-communication related impact of a bill insert is the pre-emption of limited space which might be used for other messages. As LILCO has noted, it would have no quarrel with a regulation establishing space utilization priorities.

does not involve physical by-products which threaten substantial governmental interests, the choice of the medium is as protected as the content of the message.

II.

The Commission's attempt to ban inserts discussing "controversial matters of public policy" while encouraging inserts providing "non-controversial" and "useful" information is unconstitutionally vague.

This Court has consistently ruled that whenever the State seeks to regulate expressive activity, it must act with a high degree of precision. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 785 n.21. See generally, Amsterdam, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960). Thus, the Commission's use of the vague and amorphous standard of "controversial" in its attempt to regulate LILCO's speech poses three problems of constitutional dimensions.

A. *The Commission's Standard Fails to Give Adequate Notice of the Scope of Its Proscription*

First, by utilizing vague standards, the Commission has failed to provide adequate notice to affected parties of the scope of the Commission's proscription.

In *Connally v. General Construction Company*, 269 U.S. 385 (1926), this Court reversed a conviction for failing to pay the "current rate of per diem wages in the locality where the work is performed." In holding the statutory standard unconstitutionally vague, this Court stated:

> "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Id.* at 391.

In *Lanzetta v. New Jersey,* 306 U.S. 451 (1939), this Court reversed a conviction under a statute which forbade persons to be "racketeers," holding:

> "No one may be required at peril of life, liberty or property to speculate at the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Id.* at 453.

Finally, most recently, in *Smith v. Goguen,* 415 U.S. 566 (1974), this Court invalidated a Massachusetts statute which prohibited "contemptuous" treatment of an American flag, as void for vagueness because it failed to provide adequate notice of the proscribed behavior. As Mr. Justice Powell noted in *Goguen,* "what is contemptuous to one man may be a work of art to another."[21] *Id.* at 573.

The standard of "controversiality" adopted by the Commission in this case is even less calculated to

[21] Quoting from Note, 66 Mich. L. Rev. 1040, 1056 (1968). Mr. Justice Powell obviously did not believe that wearing a flag patch on the seat of one's pants was a work of art. However, the phrase illustrates the essentially subjective nature of "contemptuousness". It would be a fair paraphrase of Mr. Justice Powell to note that what is controversial to one man may be revealed truth to another.

give notice of what it actually forbids than were the three standards invalidated in *Connally, Lanzetta* and *Goguen.* Accordingly, the Commission's regulation is unconstitutional. See also, *Hynes v. Borough of Oradell,* 425 U.S. 610 (1976).

B. ***The Vagueness Inherent in the Commission's Standard Will Deter Persons From Engaging in Constitutionally Protected Communication***

The existence of a vague prohibition on communicative activity inevitably acts to chill expression which persons fear *may* fall within the prohibition. Thus, vague prohibitions in the area of the First Amendment create an intolerable degree of self-censorship on the part of persons who tailor their activity to avoid violating a possible construction of the vague prohibition.

In *Keyishian v. Board of Regents,* 385 U.S. 589 (1967), this Court invalidated New York's Feinberg Law which mandated removal of teachers for (a) "treasonable or seditious" utterance or (b) for "wilfully and deliberately advocat[ing], advis[ing], or teach[ing] the doctrine of forceful overthrow of the government." In declaring New York's standards unconstitutionally vague, this Court noted:

> "We emphasize once again that 'precision of regulation must be the touchstone in an area so closely touching our most precious freedoms;' [f]or standards of permissible statutory vagueness are strict in the area of free expression . . . Because First Amendment freedoms need breathing space to survive, government may regulate

in the area only with narrow specificity. New York's complicated and intricate scheme plainly violates that standard. When one must guess what conduct or utterance may lose him his position, one necessarily will steer far wider of the unlawful zone." 385 U.S. at 603-604.

See also, e.g., *NAACP v. Button,* 371 U.S. 415 (1963); *Speiser v. Randall,* 357 U.S. 513 (1958); *Cramp v. Board of Public Instruction,* 368 U.S. 278 (1961); *Baggett v. Bullitt,* 377 U.S. 360 (1964).

The standard of "controversiality" imposed by the Commission is even more objectionable than the "treasonable or seditious utterance" standard found wanting in *Keyishian.* Given the very drastic sanctions which may flow from a violation of the Commission's order, affected persons will doubtless "steer far wider of the unlawful zone". Far from permitting First Amendment breathing space, the Commission's standards virtually compel a wide ranging and intolerable self-censorship.

C. *The Commission's Standard Vests Overbroad Discretion in Government Officials to Regulate the Content of Public Discourse*

The failure of the Commission's prohibition to provide adequate notice of the scope of its proscription and the inevitable self-censorship in doubtful cases which a vague proscription engenders both focus on the impact of a vague regulation on a potential speaker. However, a vague speech regulation affects the regulator as well as the speaker. This Court has recognized that a third major vice of a vague speech regulation is the overbroad discretion which such a

regulation vests in petty officials to determine whether a given communication is covered by the regulation in question. *Hynes v. Borough of Oradell,* 425 U.S. 610 (1976). In effect, a vague regulation in the First Amendment area turns the official charged with responsibility for enforcing it into a discretionary censor.

In *Hynes v. Borough of Oradell,* 425 U.S. 610 (1976), this Court invalidated a regulation of house to house canvassing because it provided overbroad discretion to local officials. In *Hynes,* the regulation required advance written notice to local police by "any person desiring to canvass, solicit or call from house to house for a recognized charitable . . . or political campaign or cause." After recognizing that the ordinance failed to afford sufficient notice of the scope of its proscription, Chief Justice Burger, writing for the Court, noted:

> "Nor does the ordinance provide explicit standards for those who apply it. [Quoting from *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972)]. To the extent that these ambiguities . . . give police the *effective* power to grant or deny permission to canvass for political causes, the Ordinance suffers in its practical effect from the vice condemned in *Lovell, Schneider, Cantwell* and *Staub.* See also, *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162 (1972); *Coates v. Cincinnati,* 402 U.S. 611, 614 (1974)." 425 U.S. at 622 (emphasis in original).

In *Smith v. Goguen,* 415 U.S. 566 (1974), this Court invalidated a Massachusetts statute prohibiting

contemptuous flag usage. After noting the failure of the statute to warn persons of the scope of its proscription, Mr. Justice Powell, writing for the Court, stated

> "Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections.
>
> . . .
>
> Where inherently vague statutory language permits . . . selective law enforcement, there is a denial of due process." 415 U.S. at 575-576.

Given the essentially subjective nature of whether a particular communication is or is not "controversial", the Commission's standard vests more discretion in the Commission than the overly broad discretion condemned as excessive in *Hynes* and *Goguen*.

In an attempt to save its overly vague regulation, the Commission has offered to issue advance rulings on whether a proposed leaflet is or is not "controversial". Far from saving the regulation, the Commission's offer merely highlights one of its principal vices. The obvious discretion which such a procedure vests in the Commission's staff gives the staff "*effective* power", in Chief Justice Burger's words, to impose its subjective likes and dislikes on the populace. There could hardly be a more clear-cut example of the type of regulation doomed by *Hynes* and *Goguen*. See also, *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969)

In *Shuttlesworth*, the Court invalidated a parade permit statute which required the City Commission

to grant the permit "unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused." Mr. Justice Stewart, writing for the Court held:

> "There can be no doubt that the Birmingham ordinance . . . conferred upon the City Commission virtually unbridled and absolute power to prohibit any 'parade', 'procession' or 'demonstration' on the city's streets or public ways. . . . This ordinance . . . therefore fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority is unconstitutional." *Id.* at 150.

The Commission's offer of an advance ruling on whether its staff believes a leaflet is "controversial" is precisely the type of standardless licensing which *Shuttlesworth* forbids.

In *First National Bank of Boston v. Bellotti, supra,* Mr. Justice Powell noted that a Massachusetts statute which forbade corporations from speaking on issues which did not "materially affect" the business of the corporation violated the void for vagueness doctrine. 435 U.S. at 785, n. 21. The "controversial" standard chosen by the Commission is even vaguer than the language deemed insufficient by Mr. Justice Powell in *First National Bank*. No reference to a chaotic and poorly reasoned body of administrative decisions dealing with accounting practices can cure

the vice inherent in the Commission's vaguely worded prohibition. Viewed in its most favorable light, the vagueness of the Commission's standard vests Commission employees with virtually standardless discretion to decide whether a given issue is "controversial". Such standardless discretion, even if exercised in good faith, renders the regulation unconstitutional.

In 1975, LILCO enclosed a bill insert informing residents of the Long Island community of the existence of the Federal Food Stamp Program. To this day, despite the assurances of the Commission, it remains impossible to know whether a similar Food Stamp insert would violate the Commission's ban.[22] Given the inherently subjective nature of the "controversiality" standard adopted by the Commission, it lies solely within the Commission's discretion to permit or to forbid the dissemination of the Food Stamp insert. Such an open-ended grant of power to decide whether a given communication should or should not be permitted is precisely the evil which the "void for vagueness" doctrine is designed to eliminate.[23]

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[22] Although the Food Stamp program enjoys wide support, substantial opposition exists to the concept of Federal subsidies and the manner in which the Food Stamp program is administered.

[23] The Commission's observation that the standard adopted by the Federal Communications Commission in connection with the fairness doctrine is similar to the standard promulgated by the Commission is beside the point. The consequence of falling within the F.C.C. fairness doctrine is more speech. Thus, the fear of arbitrary censorship which animates the void for vagueness doctrine is not present in the context of the fairness doctrine. The consequence of falling within the Commission's ban, however, is the suppression of speech. Thus, the danger of arbitrary censorship is the central vice of the Commission's ban. Instead of looking to the F.C.C. fairness doctrine for guidance, LILCO invites the Court's attention to this Court's clear command that regulation of corporate speech comply with the vagueness doctrine. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 785, (1978) n. 21.

CONCLUSION

For the above-stated reasons the decision of the Court of Appeals of the State of New York should be reversed.

Respectfully submitted,

Dated: New York, New York
November 10, 1979

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Appendices

APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Docket No. 77 C 972

LONG ISLAND LIGHTING COMPANY,

Plaintiff,

—against—

THE NEW YORK STATE PUBLIC SERVICE COMMISSION *et al.*,

Defendants.

MEMORANDUM AND ORDER

PRATT, J.:

I. INTRODUCTION

Plaintiff Long Island Lighting Company (LILCO) commenced this action to declare unconstitutional and to enjoin enforcement of orders issued by defendant New York State Public Service Commission (PSC) which prohibit (1) LILCO's promotional advertising of electrical space heating for residential use, and (2) LILCO's use of inserts in its billing envelopes to disseminate its views on the uses and benefits of nuclear energy. The action is brought pursuant to 42 USC § 1983 and its jurisdictional counterpart, 28 USC § 1343(3); the Declaratory Judgment Act, 28 USC § 2201 *et seq.;* and the first and fourteenth amendments. Jurisdiction of a federal question is also alleged under 28 USC § 1331(a), the rights at issue allegedly being valued in excess of $10,000.[1]

[1] Since 42 USC § 1983 is a sufficient predicate for jurisdiction under 28 USC § 1343(3), the direct constitutional claims

By memorandum and order dated August 31, 1977, the court permitted certain organizations and individuals to intervene, pursuant to FRCP 24(b), as parties defendant, but solely with respect to the issues involving the bill inserts. LILCO now moves, pursuant to FRCP 65, for a preliminary injunction, or in the alternative, for summary judgment pursuant to FRCP 56. PSC cross-moves to dismiss the action, based on the Johnson Act, 28 USC § 1342.

For purposes of the summary judgment motion, LILCO has conceded the existence of certain material facts alleged by the defendants to be in dispute, although the latter assert that even with such concessions, some material issues of fact remain. Nonetheless, as more fully explained below, the court determines that there are no disputed facts which are material to the dispositive issues.

II. Background and Nature of the Action

A. *The Parties.*

LILCO, a New York corporation, is a public utility engaged in the business of generating and supplying electrical and gas energy to approximately 900,000 residential and commercial customers in the counties of Nassau, Suffolk, and parts of Queens.

PSC is the public authority charged, pursuant to Article IV of the New York Public Service Law, with general powers of supervision and regulation over the activities of gas and electric utilities. See NY Pub. Serv. Law §§ 65, 66.

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asserted under 42 [sic] USC § 1331(a) and the first and fourteenth amendments are disregarded. See *Monell v. Dept. of Social Services*, ___ US ___, 98 SCt 2018 (1978); *Turpin v. Mailet*, 579 F2d 152 (CA2 1978), *judgment vacated*, 47 USLW 3368 (US Nov. 27, 1978), *modified on remand*, 47 USLW 2474 (CA2 Jan. 16, 1979) (en banc).

Intervenors are several individuals and non-profit organizations involved in the dissemination of information on nuclear power issues. Members of the organizations and the individual intervenors are customers of New York utilities, including LILCO, and have been recipients of bill inserts expressing views with which they disagree.

B. *PSC's Policy and Orders.*

In 1973 PSC gave notice of a proposal to issue an order restricting certain uses of electric energy. Prompted by a critical shortage in fuel oil available to generate electricity in the state, PSC proposed a variety of energy saving steps, invited written comments on its proposals, and required each utility to publish the proposals immediately. In addition, PSC ordered that "all electric corporations are hereby prohibited from promoting the use of electricity through the use of advertising * * *". LILCO did not then challenge that prohibition on advertising; instead, it complied with the order by ceasing to advertise electric space heating, a method of residential heating it had actively promoted for a number of years.

In 1976 PSC undertook a reexamination of the subjects of advertising by utilities and the promotion of electricity sales, and after receiving comments on the proposed position, it adopted on February 25, 1977 a "Statement of Policy on Advertising and Promotional Practices of Utility Companies" (Policy Statement). As part of that statement PSC concluded "that the existing ban on promotion of electricity sales should be continued."

Simultaneously with the policy statement, the commission issued an "order implementing certain restrictions on utility advertising" in which it ordered that

> All utilities subject to the jurisdiction of this Commission shall discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy.
>
> PSC order issued 2/25/77; Ex. III to complaint.

Several public utilities petitioned for rehearing, and on July 14, 1977, PSC issued its order denying those petitions.

On first amendment grounds, LILCO challenges both PSC's continued absolute prohibition against a utility's advertising to promote the use of electrical energy, and its order forbidding the use of bill inserts to present views of LILCO's management on "controversial issues of public policy." LILCO was and is directly affected by both bans, because it wishes to resume its promotion of electric space heating for residences, and it wishes to resume use of bill inserts as a means of promoting management's views on nuclear power, an issue of public policy that concededly is controversial, particularly on Long Island where LILCO is now engaged in planning and constructing two nuclear powered generating stations.

C. *State Court Proceedings.*

After this action was begun, other New York public utilities commenced two Article 78 proceedings in the New York State Supreme Court, Albany County, challenging the same two aspects of the 1977 policy statement and order that are at issue here. In separate decisions dated February 17, 1978, Judge Miner upheld PSC's ban on promotional advertising, but invalidated the ban on bill inserts, finding it to be an unconstitutional restriction on commercial speech. In a brief decision dated July 21, 1978, the Appellate Division, Third Department affirmed on the bill insert issue, but reversed on the promotional advertising issue, thus finding both bans to be constitutional and within PSC's statutory authority. Appeals in both cases are now pending before the New York State Court of Appeals.

D. *PSC's Motion to Dismiss.*

PSC's motion to dismiss the action on the basis of the Johnson Act, 28 USC § 1342, is denied. That statute de-

prives the district court of jurisdiction, under certain circumstances, to "enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency * * *." 28 USC § 1342.

PSC argues that rate issues are involved in both parts of this case in that (1) promotional advertising of electrical energy will eventually cause an increase in rates to consumers, and (2) using bill inserts to promote nuclear energy requires ratepayers to subsidize part of the mailing cost. Thus, according to PSC, both of the challenged orders are based on its rate-making responsibilities.

The Johnson Act "proscribes federal court injunctions of orders affecting public utility *rates*", *United States v. Public Service Com'n.*, 422 F Supp 676, 678 (D Md. 1976) (emphasis in original). While it has been considered that the act's prohibition "is not avoided by basing the action on the civil rights provisions of 28 USC § 1343(3) and 42 USC § 1983", *Klotz v. Consolidated Edison Co. of New York, Inc.*, 386 F Supp 577, 584 (SDNY 1974), it has also been held that "[t]he Johnson Act does not apply to [a] civil rights complaint" that attacks a public electric utility's credit policy, without challenging its electric rates. *Cody v. Union Electric Company*, 545 F2d 610, 611 (CA8 1976). As in *Cody*, the action here does not challenge any rates set by PSC; rather, the complaint alleges that PSC's orders violate LILCO's civil rights under 42 USC § 1983 and the first amendment. Such allegations, if proved, "justify federal remedial action". *Id.* at 612.

The relationship between PSC's orders and public utility rates in New York is indirect, remote, even debatable. Essentially, PSC argues that the effect of these activities, if not proscribed, would be to increase the cost of electricity and thereby force a change in public utility rates. But virtually all that PSC does has similar potential effects on the cost of services, and the Johnson Act was not intended to immunize all public utility activity from federal court injunctions; instead, it prohibits review only of "any

order affecting rates." To fall within the Johnson Act's prohibition, therefore, a challenged order must more directly affect rates than do the ones here under attack. Accordingly, PSC's motion to dismiss is denied.

III. Commercial Speech

Before addressing the two main issues of the case, the court must first consider the role of commercial speech under the first amendment. Until recently the first amendment's protection of commercial speech was severely limited. See, *e.g.*, *Valentine v. Chrestensen*, 316 US 52 (1942). In a series of cases decided since 1974, however, commercial speech has received extensive consideration and analysis, and its protection under the first amendment has been greatly expanded.

In *Bigelow v. Virginia*, 421 US 809 (1975), the Supreme Court stated: "[commercial] speech is not stripped of First Amendment protection merely because it appears in that form." *Id.* at 818. In that case, the Court balanced the first amendment interest against the government interest allegedly served by a regulation making it illegal to sell or circulate any publication encouraging or promoting the processing of an abortion. Holding the statute to be an unconstitutional infringement of the first amendment, the Court noted:

> We need not decide in this case the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit. Advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest. * * * To the extent that commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the government interest alleged. Advertising

> is not thereby stripped of all First Amendment protection. The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.
>
> *Id.* at 825-26 (citations and footnotes omitted).

That commercial speech is entitled to first amendment protection was confirmed in *Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council*, 425 US 748 (1976), where the Court held unconstitutional a state ban on advertising the prices of prescription drugs, concluding that a state may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." *Id.* at 773.

First amendment protection for commercial speech has been reiterated and reaffirmed in still more recent cases. In *Linmark Associates, Inc. v. Township of Willingboro*, 431 US 85 (1977), the Court struck down a local ban on the posting of "For Sale" signs on residential property, holding that the ordinance in question impaired the flow of truthful and legitimate commercial information to residents. In *Carey v. Population Services International*, 431 US 678 (1977), the Court struck down a ban on advertising contraceptives because the information was a matter of substantial individual and societal interest. In *Bates v. State Bar of Arizona*, 433 US 350 (1977), the court struck down an absolute ban on lawyer advertising, holding that such commercial speech "serves individual and societal interests in assuring informed and reliable decision making", *id.* at 364, and is, therefore, entitled to constitutional protection.

Most recently in *First National Bank of Boston v. Bellotti*, ___ US ___, 98 SCt 1407 (1978), the Supreme Court addressed a matter of collateral concern here, the first amendment rights of a corporation, and flatly rejected the proposition that speech by business entities is

not protected by the first amendment. Invalidating a statute that prohibited a corporation from spending corporate funds in order to disseminate views on state referenda whose issues were not materially related to the company's business, the Court noted that:

> [i]f the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It [discussion of governmental affairs] is the type of speech indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.
>
> *Id.*, 98 SCt at 1416.

Thus, simply because LILCO is a public utility corporation does not deprive it of all first amendment rights.

To determine the constitutionality of the challenged bans on LILCO's communications, the court must balance the first amendment interests asserted by LILCO against the government interests claimed to be served by PSC's orders. See *Bigelow v. Virginia, supra,* 421 US at 826; *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra; Linmark Associates, Inc. v. Township of Willingboro, supra.* The balancing analysis must be applied separately to PSC's prohibitions against promotional advertising and controversial bill inserts.

IV. PSC's Ban on Promotional Advertising of Electrical Energy

A. *Factual Background.*

There are three principal methods of home heating available to consumers on Long Island: oil fired space heating, natural gas fired space heating, and electric space heating. Limitations on the supply of natural gas effectively limit the choice to oil and electricity.

LILCO experiences broad seasonal fluctuations in the demand for electrical power; demand increases during the

summer months, attributable to air conditioner use, and decreases during the winter months. As a result, part of the generating capacity that LILCO requires to satisfy summer demand is not utilized during winter months when demand is lower.

To offset some of the fixed costs associated with owning and operating generating facilities all year, and thereby to use its generating facilities more efficiently, LILCO has in the past sought to stimulate electrical consumption during the winter months by advertising the advantages of electric space heating for residential use. Since almost all of LILCO's electrical generating capacity consists of oil fired generating stations, an increase in demand for electrical energy would increase the amount of oil required to generate it.

When the 1973 embargo on oil shipments from the Middle East to the United States caused a domestic oil shortage, PSC sought to limit the demand for electricity by forbidding all promotional advertising by utilities. LILCO complied with PSC's 1973 order and ceased its promotional advertising of electric space heating. Despite contentions that there was no longer a shortage of oil and that oil supplies were sufficient to serve current as well as additional customers of electrical energy, PSC in its 1977 Policy Statement and accompanying order continued its ban on promotional electricity advertising.

In continuing the ban, PSC noted that its highest priority was conservation of energy resources. It reasoned that increased off-peak generation of electricity consumes valuable energy resources and, if it is the result of increased sales, necessarily creates incremental air pollution and thermal discharges to waterways. Moreover, since most of the major utility companies use oil fired generating facilities, any increase in off-peak generation would aggravate the nation's already unacceptably high level of dependence on foreign sources of oil supply. PSC believed "that a continued proscription of promotion of electric sales will result in some dampening of unnecessary

growth so that society's total energy requirements will be somewhat lower than they would have been had electric utilities been allowed to promote sales." 1977 Policy Statement at 5.

In short, PSC continued its ban on promotional advertising of electricity in order to reduce consumption of electricity and other energy resources. PSC did, however, permit public utilities to advertise time-of-day rates as a means of encouraging shifts of electrical energy consumption from peak to off-peak times, without increasing aggregate sales, and it indicated that should there be a sufficient change in conditions it would from time to time reexamine its ban on promotional advertising of electrical energy.

Although it may not advertise electric heat, LILCO is permitted to provide advice and information to any individual who requests such information. Moreover, PSC has not barred public utilities from advertising the merits of gas fired space heating, nor does it restrict advertising for oil fired space heating, since PSC has no jurisidiction over oil dealers.

Without conceding their truth, LILCO has assumed the following allegedly material facts solely for purposes of the motion for summary judgment:

> 1. That electric space heating consumes more oil than oil fired space heating;
>
> 2. That electric space heating is ecologically less desirable than oil fired space heating;
>
> 3. That promotion of electric space heating may cause a general rise in the demand for electricity; and
>
> 4. That there is substantial difficulty in establishing a pricing structure for electric space heating service which accurately reflects the marginal cost of providing such service to each consumer.

PSC urges, however, that other allegedly material facts are in dispute and prevent summary judgment. First, PSC asserts that LILCO's concession on pricing structure is limited only to electric space heating, when the issue is whether the rates charged for *all* electric service can be based on an economically efficient pricing structure which would also adequately reflect the marginal costs of electric production for all consumers of electricity. Second, PSC contends that promotion of electric space heating will lead to greater use of heat pumps, which will in turn produce an increase in the peak-time (summer) consumption of electricity due to increased use of air conditioning. Finally, PSC claims there is a factual issue as to whether increased electric production by LILCO would result in increased use of energy inefficient gas turbines, the costs of which would be passed on to all of LILCO's customers, not just those who use electric space heaters.

These factual issues raised by PSC are more appropriate to a PSC proceeding involving the merits of electric heat or a proper pricing structure for electric heat rates. They are not material to a decision on LILCO's first amendment challenge to PSC's flat ban on all promotional advertising of electrical energy. The issue is not whether PSC may directly prohibit or restrict the use of electric heat, but whether PSC may attempt to do so by preventing public utilities from truthfully advertising its advantages. On this issue the merits or demerits of electric heat are simply not material.

B. *Discussion.*

To decide this issue, the court must assess LILCO's and the public's first amendment interests in the free flow of information contained in the advertising, and then determine whether such interests are outweighed by the public interests allegedly served by the ban on such advertising. See *Bigelow v. Virginia, supra,* 421 US at 826; *Metpath, Inc. v. Imperato,* 450 FSupp 115, 117 (SDNY 1978).

To begin with, LILCO has an obvious economic interest in promoting the use of electrical energy and in advertising the availability of its services for electric space heating. That its interest is economic does not deprive it of first amendment protection. See *Bates v. State Bar, supra*, 433 US at 363-64; *Virginia State Board v. Virginia Citizens, supra*, 425 US at 762-63.

Beyond LILCO's economic interest is the public's interest in the free flow of information on the use of electrical energy for home heating. The consumer has a substantial interest in receiving truthful information on electric space heating. Not only does promotional advertising provide information of general public interest concerning electrical energy, it also assists an individual's economic decisions on the benefits and detriments of electric heat. Choosing among oil, gas, or electric residential heating may significantly affect his budget and daily comfort. Moreover, the public in general has an interest in receiving information on the various methods of heating, in order to utilize energy resources ecologically and efficiently. As explained by Justice Blackmun, writing for the court in *Bates v. State Bar, supra*,

> [t]he listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decision making.
>
> *Bates v. State Bar, supra*, 433 US at 364 (citations omitted).

With respect to promotional advertising, then, "where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both." *Virginia State Board v. Virginia Citizens, supra*, 425 US at 756.

The next question is whether the interests allegedly furthered by the PSC ban outweigh these first amendment interests.

As reflected in its 1977 Policy Statement, PSC's major reason for continuing its ban on promotional advertising was to curb the increased use of electricity in New York. Additional reasons offered have been the maintenance of an economically stable and efficient electric rate structure and preservation of the environment. PSC's position is clear from its counsel's argument:

> A reversal of the Commission's prohibition on advertising would prohibit the Commission from taking an effective means to curb the growth of electric usage in New York State, a growth that has over the past several years increased costs and rates, consumed expensive foreign oil and increased the environmental impact of public utility operations.
>
> Defendants' Memorandum of Law in Opposition to Motion for Summary Judgment, at 27.

Of course, these are legitimate interests which the state properly may seek to further; but it is the method used, a direct infringement of first amendment interests, that is under scrutiny.

PSC has not sought to limit the use of electricity directly; rather, by suppressing accurate promotional information it is attempting to avoid certain perceived detrimental effects of electric space heating. Although PSC's objectives might properly be achieved through direct regulation of electric space heating or, indeed, of all electrical consumption, PSC is attempting an indirect regulation through the advertising ban, which, by deliberately

inhibiting public awareness of the merits of electric heat, attempts to avoid increased consumption of electricity. This, PSC cannot do, because it is a significant interference with the first amendment. As the Supreme Court has observed,

> * * * it seems peculiar to deny the consumer * * * at least some of the relevant information needed to reach an informed decision. The alternative—the prohibition of advertising—serves only to restrict the information that flows to consumers. Moreover, the argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, *we view as dubious any justification that is based on the benefits of public ignorance.*
>
> *Bates v. State Bar, supra,* 433 US at 374-75 (emphasis supplied).

In *Virginia State Board, supra,* a state licensing authority sought to justify a total ban on advertising the prices of prescription drugs sold by pharmacists. The Supreme Court observed:

> The strength of these proffered justifications is greatly undermined by the fact that high professional standards, to a substantial extent, are guaranteed by the close regulation to which pharmacists in Virginia are subject.
>
> * * *
>
> * * * [T]he State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance. The advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is

> assumed people will have to the free flow of drug price information.
>
> * * *
>
> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.
>
> * * *
>
> *It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.* Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them * * * in other ways. But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering.
>
> *Virginia State Board v. Virginia Citizens, supra,* 425 US at 768-70 (emphasis supplied) (citations omitted).

PSC has statutory power to regulate the use of electrical energy directly by fixing rates, by approving construction of new generating facilities or expansion of existing ones, or by allocating quantities of energy production. See NY Pub. Serv. Law § 66. But it may not do so "by keeping the public in ignorance" of the entirely lawful use of electric space heating. See *Virginia State Board, supra,* 425 US at 770.

PSC argues that the ban does not suppress information concerning electric heat because LILCO is not prohibited from discussing the topic with anyone who seeks information about it. However, permitting communication to a

customer *if* he inquires, does not save the ban. The fact that the seller could provide information to a prospective purchaser who inquired did not save the bans on advertising lawyer services in *Bates v. State Bar, supra;* on posting "For Sale" signs on homeowners' lawns in *Linmark Associates v. Township of Willingboro, supra;* on advertising prices of prescription drugs in *Virginia State Board, supra;* or on advertising contraceptives in *Carey v. Population Services, supra.* Nor does it save PSC's ban on promotional advertising of electric heat.

PSC also argues that its ban does not unconstitutionally suppress information about electric heat because it does not affect advertising by appliance dealers who sell electric space heating devices. This argument is not persuasive. For one thing, PSC has no jurisdiction over such appliance dealers. In addition, "serious questions exist as to whether the [order] 'leaves open ample alternative channels of communication'". *Linmark Associates, Inc. v. Township of Willingboro, supra,* 431 US at 93. PSC has presented nothing to show that appliance dealers have been advertising electric heat through newspapers, radio or any other media designed to reach a large audience. Its ban thus has the effect of suppressing virtually all truthful information concerning electric heat.

As the Court most recently observed:

> * * * the First Amendment * * * prohibit[s] government from limiting the stock of information from which members of the public may draw. A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the "free flow of commercial information".
>
> *First National Bank v. Bellotti, supra,* 98 SCt at 1419-20.

Like the statutes and regulations challenged in other cases, PSC's ban on promotional advertising of electricity inhibits the "free flow of commercial information." Although the public interests sought to be served by PSC are important, it is not necessary to suppress protected speech in order to achieve those ends. Since the allegedly harmful consequences of increased usage of electric heat may be regulated by means that are not only more directly related to the results sought, but also less restrictive of LILCO's first amendment rights, PSC's ban on promotional advertising of electricity by public utilities is unconstitutional.

V. PSC's Ban on Controversial Bill Inserts

A. Factual Background.

In order to publicize its belief that "nuclear generated power is the most economical, efficient and socially desirable method of meeting Long Island's need for increased energy", Plaintiff's memorandum at 22, LILCO has at times communicated its views about nuclear power to its customers through the use of bill inserts. LILCO believes that such inserts provide a significant medium for efficiently communicating with its customers at reasonable cost.

There is no claim that LILCO's bill inserts have been false or defamatory, nor is there any dispute that such communications on nuclear power are political in nature, that they must be paid for solely by LILCO shareholders, and that their out-of-pocket costs may not be considered an expense of doing business for rate making purposes.

PSC's ban on the use of such bill inserts had its origin in a complaint filed with PSC by the Natural Resources Defense Council, Inc. one of the intervenors in this case, which sought redress for a similar 1976 Con Edison bill insert that discussed the need for nuclear power development. After investigation and hearing, PSC determined

that bill inserts should not be used to express the opinion of management on "controversial issues of public policy".

In the lengthy policy statement issued on February 25, 1977, PSC explained its reasoning. After summarizing its long-standing position that ratepayers should not bear the expense of advertising which states a utility's position on a matter of public controversy, PSC concluded that such advertising would not be permitted to be included as a bill insert, even when the stockholder pays for it in full. PSC summarized its position as follows:

> Further, we shall not permit advertising on matters of public controversy to be included in the printed material that often accompanies the mailing of consumer bills. We believe that using bill inserts to proclaim a utility's viewpoint on controversial issues (even when the stockholder pays for it in full) is tantamount to taking advantage of a captive audience, since the consumer cannot avoid receiving the literature with the utility's message. Regardless of whether consumers read the material, it is basically unfair to subject ratepayers who disagree with the utility's viewpoint to the arguments of the utility through its billing mechanism. A utility company's mailing list provides an available conduit for the easy dissemination of information, which should be used for the benefit of both the consumer and the company to convey noncontroversial and useful information that will create a better informed public. It should not become a vehicle for dissemination only of the company's views on controversial matters of public policy. Accordingly, we will not permit bill inserts to be used by utility companies for the purpose of advertising their opinions or viewpoints on controversial issues of public policy.
>
> 1977 Policy Statement at 10-11

When PSC issued its order denying the petitions of various utilities for rehearing, it considered in greater

detail the bill insert restriction in light of the utilities' first amendment contentions. It pointed out that it had not prohibited the companies from making their views known, that use of the bill insert to publicize a utility's views on matters of public controversy was in PSC's judgment improper "since it gives a utility a unique and undue advantage in publicizing its position" to a "selectively chosen target audience", that "the unique advantage * * * is then transformed into a device for presenting only one side of this issue", and that this confers "an unreasonable advantage on management that unduly discriminates against others who may not share or who oppose the company's views". PSC Order Denying Rehearing, at 6 (July 14, 1977). PSC also focused on the limitations inherent in this "unique medium of communications". Its size and weight should not be so great as to require additional postage, and it can be mailed only once a month, and in many cases, only once every other month.

In PSC's view, bill inserts should be used "*primarily* to convey information that is clearly helpful to consumers" (emphasis supplied), and the prohibition is aimed at preserving that "public interest objective". Moreover, according to PSC, no one else can obtain the "wide captive audience for bill inserts" that is enjoyed by utilities having monopoly franchises conferred by the government. In its view, this aspect makes the utility bill insert medium analogous to the limited spectrum space available for radio and television broadcasting, a consideration that leads to problems of "fairness" and equal time so as to permit organizations with opposing viewpoints an opportunity to disseminate their opinions as inserts in the utility's bill. *Id.* at 7-8. After considering that approach, all PSC members were convinced ultimately "that it would be difficult to administer fairly, and would tend to lessen undesirably the number of bill inserts dealing directly with such useful and uncontroversial information as consumer conservation measures." *Id.* at 8. PSC also noted that the privilege to disseminate utility bill inserts derives

from the privilege of franchise monopoly conferred by the government, and that it can, therefore, be regulated by the government to assure that it is exercised in the public interest.

Solely for the purpose of the summary judgment motion, LILCO has assumed certain facts to be established: (1) that LILCO derives an intangible benefit from the distribution of bill inserts discussing its views on controversial issues, although it contends that no consumer incurs any out-of-pocket expenses attributable to the bill insert program, and, (2) that alternative means of communication, such as newspaper advertising, are available at comparable cost, but that in management's opinion, such alternative means are not as effective a form of expression.[2]

PSC and intervenors argue that there is a factual dispute as to whether LILCO's customers (the ratepayers) are forced to subsidize political views with which they

[2] PSC disputes LILCO's contention that bill inserts are an effective means of communication compared to other methods, but LILCO has acceded to PSC's view for purposes of this motion, so there is no dispute as to this fact. It should be noted, however, that LILCO's position on the relative cost efficiency of bill inserts, compared with other forms of communication to the public, is supported by a PSC ruling that required utilities to use bill inserts to notify customers of prospective rate changes:

> While other methods of notification of rate filings are required by statute and the Commission's rules, the narrative description under discussion should be easier to read and understand and would be provided to all customers directly. *We believe that the bill insert requirement we have proposed should effect a significant improvement in notice to the public at minor cost.*
>
> Petition of Consumer Protection Board, NYS Public Service Commission, Case 26972, at 5-6 (Aug. 10, 1976) (emph. supp.).

Prior to this ruling, utilities were required to use newspaper advertisements to notify customers of proposed rate changes and hearings on such changes. Thus, despite its argument to the contrary in this case, PSC itself has recognized bill inserts as an efficient means of communication.

disagree, or in other words, whether all the costs of bill inserts containing political advertising can realistically be allocated between LILCO's ratepayers and shareholders. PSC claims that cost allocation is difficult for three reasons: first, since bill envelopes are limited in size LILCO would have less space to provide for information related to utility services or energy conservation tips if it provided more space for political messages; second, since the determination of rates is based on past expenses and anticipated increases, LILCO might prevent a loss of earnings stemming from cost allocation of political advertising, by simply spending less on customer service; finally, since rates are also set to insure profits for capital formation, a loss in LILCO's earnings due to cost allocation of political advertising expenses (including such advertising in bill inserts) could be made up by increasing electric rates in order to bring in sufficient income to raise the necessary capital. These arguments about cost allocation, however, are irrelevant to PSC's ban on controversial bill inserts, which was to apply "even when the stockholder pays for it in full." 1977 Policy Statement at 10.

Moreover, PSC has presented no facts to support its contention that, contrary to LILCO's position, costs cannot be allocated between ratepayers and shareholders. See *SEC v. Research Automation Corporation et al.*, 585 F2d 31, 33 (CA2 1978). Indeed, it seems inequitable for PSC to allege a factual dispute that is the result of its own admitted failure to formulate a cost allocation scheme for bill inserts. Nor have intervenors alleged facts to indicate that a fair cost allocation is impossible. On the other hand, LILCO's contention that cost allocation is feasible, is supported by facts. During a three month period in 1977, LILCO employees kept time sheets to determine the extent to which they were engaged in the bill insert process, LILCO's 9(g) Statement, Part B, ¶ 25; a list of hours and allocated salaries, as well as the cost of single sheet and more elaborate bill inserts discussing nuclear power, is also provided. LILCO 9(g) Statement, Part B, ¶ ¶ 25-26.

From these it appears feasible for PSC to allocate the costs of a bill insert so that they may be attributed solely to LILCO's shareholders, and not to its ratepayers.

On the issue of whether bill insert costs can be apportioned, different methods of allocation are possible. One approach would be to charge the shareholders any additional costs of the inserts over and above the costs of mailing the bills to the ratepayers. Another would be just the reverse, that is to charge to the shareholders the full cost of mailing the inserts and envelopes and only incremental costs to the ratepayers for including the bills. A third would be to prorate the costs of the single mailing between the bill and the insert on a basis of space, number of words, or other reasonable manner. In any event, the problem is administrative, not constitutional.

Whatever allocation method might be used, however, to the extent that the cost of an insert is less than the cost of a separate mailing of the same insert, it would represent a benefit or "free ride" to shareholders which had been paid for by ratepayers. Moreover, LILCO concedes that with any method of allocation there would be an intangible benefit from using bill inserts arising out of its access to a prepared mailing list and access to an existing bill stuffing and mailing system.

B. Discussion

1. LILCO and its advocacy of nuclear power are both entitled to some first amendment protection.

In *First National Bank v. Bellotti, supra,* the Supreme Court ruled that corporate speech is entitled to first amendment protection, even when such speech deals with matters unrelated to the corporation's business interests. The thrust of the decision was that in the free discussion of governmental affairs, the nature of the speaker is not constitutionally significant and does not call into question different first amendment considerations. The Court noted

that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source, whether corporation, association, union, or individual." *Id.,* 98 SCt at 1416.

LILCO argues that the purpose of its communications on nuclear power is to inform customers of the advantages of that form of energy and to reassure customers on management's judgment in pursuing the development of nuclear power. The bill inserts prohibited by PSC seek to discuss the merits of nuclear energy, a matter of current debate and divergent opinion. LILCO's proposed construction of nuclear power plants on Long Island is an issue seriously affecting both individual and community interests; since opponents of nuclear energy have campaigned against the building of such facilities, the controversy has received substantial media attention. Even though LILCO may stand to gain commercially from completion of the nuclear plants, the information it seeks to disseminate is essentially political, and "[s]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana,* 379 US 64, 78 (1964).

It is clear, then, that debate on nuclear power is the type of speech the first amendment was designed to protect, see *Bellotti, supra,* 98 SCt at 1415, and that LILCO's interest in expressing itself on that issue is entitled to first amendment protection. It remains to be determined whether PSC's prohibition of bill inserts as a vehicle for LILCO's expression on a controversial issue such as nuclear power is an unconstitutional infringement of LILCO's first amendment rights of expression.

2. PSC's ban is not unconstitutionally vague.

LILCO argues that the ban on controversial issues of public policy in bill inserts is unconstitutional because it is vague. The court does not agree. LILCO contends that the alleged vagueness of the PSC ban raises three prob-

lems of constitutional dimension: (1) the ban fails to give adequate notice of the scope of its proscription; (2) the ban has a chilling effect on the exercise of first amendment rights; and (3) the ban vests overbroad discretion in PSC to regulate the content of proposed communications.[3] Under PSC guidelines, a public utility's expenditures for political advertising are recorded in a special "below-the-line" account, number 426.4, which excludes them from consideration as business expenses in the rate making process, thus placing their burden on shareholders rather than ratepayers.[4]

PSC interprets this special cost-allocation account to include

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[3] Extending these contentions, LILCO urges that since the PSC ban "applies only to inserts which discuss 'controversial matters of public policy' and explicitly authorizes 'non-controversial' and 'useful' inserts, [LILCO] is unable to determine whether many inserts fall into the proscribed or encouraged category." Aff. of Ira L. Freilicher, ¶ 13. As an example, LILCO refers to a bill insert discussing the federal food stamp program which had been disseminated prior to the PSC ban. LILCO argues that the food stamp program has been the subject of some controversy, and that under the present PSC ban, it would be impossible to determine whether a food stamp insert would now be deemed "controversial" or "useful". See Freilicher aff., ¶¶ 14-15. As a result, LILCO claims that it would be reluctant to disseminate bill inserts on that topic in the future.

[4] The account description provides:

> This account shall include expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation or ordinances (either with respect to the possible adoption of new referenda, legislation or ordinances or repeal or modification of existing referenda, legislation or ordinances) or approval, modification or revocation of franchises; or for the purpose of influencing the decisions of public officials or advancing the political objective of the utility, but shall not include such expenditures which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility's existing or proposed operations.
>
> Account 426.4, Expenditures for Certain Civic, Political and Related Activities. 16 NYCRR, Ch. III, Sub. Ch. F.

> All advertising which seeks to sway opinion—legislative, environmental, governmental, consumer or any other kind—to the industry's position on public policy disputes.
>
> 1977 Policy Statement at 10.

PSC has also stated that it would "include in this category expenses incurred in the preparation of materials designed to influence public opinion in the current debate concerning the development of nuclear power." *Id.* The account has existed for some time; it has been the subject of various state court and regulatory decisions interpreting what is meant by "political advertising"; and LILCO has indicated that it will continue to cooperate with the PSC cost-allocation guidelines for Account 426.4. Therefore, since the "controversial issues of public policy" now barred by PSC from bill inserts are those matters whose expenses would ordinarily be recorded in Account 426.4 as political advertising, PSC argues that some guidance does exist for utilities to follow in determining whether or not a particular bill insert falls into the proscribed category.

In its decision denying reconsideration of the policy statement, PSC considered the vagueness argument directly:

> The petitioners * * * argue that the term "controversial issues of public policy" is too vague and does not give them any clear standards by which to judge the content of their bill inserts.
>
> In the [cost-allocation] Guidelines, we discussed the various types of materials that would fall within our proscription. These Guidelines are admittedly general but we expect to give them greater definition through future advisory determination. One such determination was made in our Policy Statement where we specifically included in this category expenses incurred in the preparation of materials

> designed to influence opinion in the current debate concerning the development of nuclear power. In its petition here, Con Edison requested a determination as to whether materials prepared in response to the demand by several elected officials for public operation of its facilities falls within the political category. We believe that it does and, therefore, should not be included as a bill insert. In the event a utility wishes additional guidance with respect to this matter, it should feel free to ask it. We will resolve any request expeditiously so that no undue delay will result.
>
> Order Denying Petitions for Rehearing, *supra* at 8-9.

The Supreme Court has stated that:

> [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.
>
> *Connolly v. General Construction Company,* 269 US 385, 391 (1926).

In the context of the first amendment, the court has further stated:

> We emphasize once again that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms * * *"; "[f]or standards of permissible statutory vagueness are strict in the area of free expression. * * * Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." * * * When one must guess what conduct or utterance may lose him his position, one necessarily will "steer far wider of the unlawful zone * * *." * * * For "[t]he threat of sanctions may

> deter * * * almost as potently as the actual application of sanctions."
>
> *Keyishian v. Board of Regents,* 385 US 589, 603-04 (1967) (citations omitted).

The Supreme Court thus requires "more specificity of a statute potentially applicable to expression sheltered by the first amendment than in other contexts * * *." Laurence H. Tribe, *American Constitutional Law* 719 (1978). In *Smith v. Goguen,* 415 US 566 (1974), where the Court invalidated as being unconstitutionally vague, a state provision punishing "contemptuous" treatment of the American flag, the Court noted that "[w]here a statute's literal scope * * * is capable of reaching expression sheltered by the First Amendment, the [due process/vagueness] doctrine demands a greater degree of specificity than in other contexts." *Id.* at 573. See also *Grayned v. City of Rockford,* 408 US 104, 108-09 (1972); *Papachristou v. City of Jacksonville,* 405 US 156, 162 (1972); *Lanzetta v. New Jersey,* 306 US 451, 453 (1939).

Even under these high standards it does not appear that the PSC's exclusion of "controversial issues of public policy" from bill inserts is unconstitutionally vague. In context the phrase is a synonym for the "political advertising" for which expenditures are recorded in Account 426.4. Interpretation of what is "controversial" or "non-controversial" may be governed by those considerations which determine expenditures recorded in that account. PSC has already had some expertise, and the public utilities some guidance, on what matters are considered "political" and thus subject to recording in Account 426.4; these interpretations may similarly be used as guidelines in determining what is or is not "controversial".

LILCO also cites *First National Bank v. Bellotti, supra,* to support its vagueness argument. There the Supreme Court found unconstitutional a Massachusetts statute barring corporations from making expenditures designed to influence referenda on questions other than those

"materially affecting" the property, business, or assets of the corporation. Justice Powell discussed the vague and deterrent affect of the statute's "materially affecting" standard:

> Even assuming that the rationale behind the materially affecting requirement itself where unobjectionable, the limitation in [the statute] would have an impermissibly restraining effect on protected speech. Much valuable information which a corporation might be able to provide would remain unpublished because corporate management would not be willing to risk the substantial criminal penalties—personal as well as corporate—provided for in [the statute]. * * * As the facts in this case illustrate, management could never be sure whether a court would disagree with its judgment as to the effect upon the corporation's business of a particular referendum issue.
>
> *Id.*, 98 SCt at 1420, n.21 (citations omitted).

LILCO argues that the "controversial issues of public policy" standard used in the PSC ban is even more subjective and amorphous than *Bellotti's* "materially affecting" standard. *Bellotti,* however, is readily distinguishable. The rejected standard of the Massachusetts statute had no prior history of interpretation or guidance from court or administrative opinions, whereas the language adopted by the PSC closely parallels the standard of political advertising attributable to Account 426.4, which does have a history of prior interpretation.

Moreover, as an administrative regulation the PSC restriction lacks the chilling impact of the potential jail sentence imposed by the Massachussets statute. It even bears the promise of the PSC to "expeditiously" resolve in advance any doubt about a particular proposed bill insert. Although the delay caused by even an expeditious administrative review might under some circumstances chill speech sufficiently to render the regulation unconstitutional, that is not the case here, where the affected speech lacks spontaneity and is prepared for inclusion in the monthly billing envelope.

Thus, the ban is not unconstitutional on grounds of vagueness.

3. PSC's ban does not otherwise infringe LILCO's first amendment rights.

In its order denying rehearing, PSC stated:

> We have not, of course, prohibited the utilities from expressing their corporate opinions on controversial public policy issues in any other media. They are free, like all other members of our society, to explain their positions on radio and television interviews, to seek to purchase space in newspapers, and to speak before public gatherings. For these kinds of communications, we merely require that the companies, rather than their customers, bear the costs.
>
> Order Denying Petitions for Rehearing, *supra* at 10.

Thus, PSC's order is not an absolute ban but rather, a restriction on one method of communication, a distinction that the Supreme Court has stated "is not without significance to First Amendment analysis since laws regulating the time, place or manner of speech stand on a different footing than laws prohibiting speech altogether." *Linmark v. Township of Willingborough, supra,* 431 US at 93.

The Supreme Court has

> * * * often approved [time, place, or manner restrictions] provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information.
>
> *Virginia State Board v. Virginia Citizens, supra,* 425 US at 771.

See also *Grayned v. City of Rockford, supra,* 408 US at 115-17; *Buckley v. Valeo,* 424 US 1, 17-18 (1976).

However, PSC's prohibition against using bill inserts to express management's views on "controversial issues of public policy" does not fit nicely into the category of a time, place, or manner restriction. As *Virginia State Board, supra,* teaches, three tests must be met before speech may be restricted under that analysis. Two are clearly met here; but the analysis breaks down on the third.

One test that is clearly met here is the requirement of ample alternative channels for communication. As already indicated, PSC has not prohibited utilities from urging nuclear power or other positions of a controversial nature; it has merely deprived them of the bill insert means for expounding their views. All other means of communicating with the public—newspaper advertisements, public speakers, or even house-to-house canvassing—are unaffected by the bill insert ban. Although LILCO may feel that no other approach is as effective or efficient as would be the use of bill inserts, the fact remains, nevertheless, that for communicating its views LILCO has available to it ample alternative channels, indeed all those channels that are available to virtually anyone else in our society who wishes to impress the public with a point of view. LILCO, in other words, is surely no worse off than other would-be communicators.

The second test which has been met here is that the restriction serve a significant governmental interest. PSC best summarized its justifications at pages 6 to 8 of its July 14, 1977 Order Denying Petitions for Rehearing. There, PSC expressed its belief that permitting utilities to use bill inserts to discuss controversial issues would confer an undue advantage on management, and would interfere with the primary function of bill inserts, namely to convey information that is clearly helpful to consumers. The types of information that PSC viewed to be properly distributed at ratepayers' expense, and therefore

presumably appropriately includable in bill inserts, were elsewhere described by PSC as including

> appeals for the conservation of gas or electricity; notification of emergency conditions and procedures; instructions in the proper use of the equipment which makes use of the utility's service; information about new rates, new billing practices, or new inspection or meter reading schedules; advice concerning hazards associated with the utility's service; reports on matters of interest to the public concerning the utility's service—such as service difficulties and progress in overcoming them, projections of new capacity additions, plans for new or improved means of providing service, and the like.
>
> 1977 Policy Statement at 11.

PSC viewed the inserts as directed to a wide captive audience that must open the bill and be exposed to the inserts. From this, PSC reasoned that a degree of fairness or equal time for proponents of opposing views would have to be required and that this, in turn, would not only be difficult to administer fairly, but also would tend to lessen undesirably the number of bill inserts dealing with such useful and uncontroversial information as consumer conservation measures. These are significant governmental interests properly to be weighed by PSC in regulating utilities.

The third test for a valid time, place, or manner restriction, however, is missing here, for it cannot be said that PSC's ban on use of bill inserts to express views on "controversial issues of public policy" is unrelated to the content of the regulated speech. Indeed, it is precisely because of content—controversial issues—that LILCO has been denied access to bill inserts as a medium for advocating nuclear power. The discussion does not end, however, just because the content of LILCO's speech causes its regulation, or because the PSC ban does not fit

the classic mold of a time, place or manner restriction. A content based restriction was upheld by the Supreme Court in *Lehman v. City of Shaker Heights*, 418 US 298 (1974), in which the Court affirmed a judgment of the Supreme Court of Ohio, that held there was no violation of Lehman's first and fourteenth amendment rights when the city refused to permit the display on vehicles of the city transit system of posters advertising Lehman's candidacy for public office. The city had acted under a policy which permitted commercial advertising on its vehicles, but prohibited any "political advertising". Under that policy the city had not accepted or permitted any "political or public issue advertising." Lehman urged in the Supreme Court that the car cards constituted a "public forum" entitled to first amendment protection regardless of their primary purpose.

Four justices disagreed with Lehman, distinguishing the advertising in public transit vehicles "from the traditional settings where First Amendment values inalterably prevail." 418 US at 302. Writing for the prevailing four, Justice Blackmun noted that American constitutional jurisprudence has been jealous to "preserve access to *public places* for purposes of free speech," but he nevertheless reminded us that "the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the Amendment to the speech in question." *Id.* at 302-03 (emphasis supplied). Then, stressing the difference between car card space as an incidental aspect of public transportation and free speech in open spaces, in a meeting hall, in a park, on a street corner, or in a public thoroughfare, he turned his attention to whether the city's policies and practices governing access to the transit system's advertising space were arbitrary, capricious or invidious. He found they were not, because potential revenues could be jeopardized by requiring short term political advertisements, because users would be subjected to the blare of political propaganda, because "there could

be lurking doubts about favoritism," and because "sticky administrative problems might arise in parcelling out limited space to eager politicians." Under those circumstances, Justice Blackmun wrote, "the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation." *Id.* at 304.

Summarizing his view, Justice Blackmun concluded:

> No First Amendment forum is here to be found. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity. In these circumstances, there is no First or Fourteenth Amendment violation. *Id.* at 304.

Justice Douglas cast the "swing" vote when he concurred in the affirmance because he did not believe "that petitioner has any constitutional right to spread his message before his captive audience." *Id.* at 309.

Writing for the four dissenting members of the court, Justice Brennan argued that Lehman's message was unquestionably protected by the first amendment, that by accepting commercial and public service advertising the city had voluntarily established a forum for communication, and that once a public forum has been established, discrimination-based *"Solely* upon subject matter or content" is prohibited. *Id.* at 316 (emphasis in original). Justice Brennan rejected the distinction between commercial and political advertising because "subject matter or content censorship in any form is forbidden", *id.* at 317, and he found it impossible to draw with accuracy either "the line between ideological and non-ideological speech" or a "manageable line between controversial and non- controversial messages." *Id.* at 319-20. Nor did he accept the

avoidance of "lurking doubts about favoritism" as a justification for excluding political ads when commercial ads were permitted.

Lehman was a close case, perhaps because content restrictions are not favored by the courts. Contrary to LILCO's argument, however, they need not always be justified by state interests that are "compelling". *Lehman* shows that if there is no public forum, then reasonable governmental restrictions on speech may be sustained provided they are not arbitrary, capricious, or invidious. Cf. Tribe, *supra* at 692-93. Such restrictions were upheld in *Connecticut State Federation of Teachers v. Board of Education Members*, 538 F2d 471 (CA2 1976), where the court concluded that school mailboxes, bulletin boards and meeting rooms are not public fora required to be made available to a minority union. And in *Buckel v. Prentice*, 410 F. Supp 1242 (SD Ohio 1976) a school's distribution to parents, via students, of information concerning coming theatrical events, home safety measures and the like, did not establish the "child messengers" as a public forum for first amendment purposes. The court there found that dissemination of such material was a logical and proper extension of the educational function of schools and that it did not "give rise to any right of access to student distribution by parents or other concerned citizens." 410 F. Supp at 1247.

Comparing *Lehman*, itself, with the present case we find many parallels and a few significant differences. In virtually all respects, however, PSC's position is stronger than was that of the City of Shaker Heights.

a. In both cases, there were ample alternate forums available to the speaker.

b. The government's restriction was against "political or public issue advertising" in *Lehman*, and against "controversial issues of public policy" here. Both are content based restrictions aimed at closing the medium to political or controversial messages. However, Justice Brennan's difficulty in finding a manageable line between controversial and non-controversial messages in *Lehman* may be resolved here through the existing interpretations on cost allocation and the expeditious review procedure promised by PSC.

c. In *Lehman*, the advertising space was owned and regulated by the city, but was offered generally to the public for commercial use. LILCO's mailing envelopes are, of course, owned by LILCO, but regulated by PSC. Historically, LILCO's bill inserts have been messages generated either by LILCO or by PSC, and have not been available for use by the general public at all.

d. Neither the advertising cards on Shaker Heights' busses nor LILCO's bill inserts constitute one of "the traditional settings" where, as Justice Blackmun observed, "First Amendment values inalterably prevail." 418 US at 302. As with the car cards, LILCO's bill inserts involve "no open spaces, no meeting hall, park, street corner, or other public thoroughfare."

e. LILCO is engaged in the commercial activity of providing gas and electric service to the public. Its primary obligation is to provide efficient, economical utility service to Long Island residents under a monopoly franchise that is regulated in the public interest by PSC. Charges for its services are summarized in bills that are mailed in envelopes. From time to time, additional messages to the energy consumer have been included in the bill envelope. At times PSC has required certain messages to be brought to the consumer's attention by that means, and at other times, LILCO has sought to communicate with its consumers directly through the bill inserts. Clearly, what may be included in the billing envelopes is incidental to the basic service functions of both LILCO and PSC, just as providing car card space was incidental to Shaker Heights' function of providing public transportation.

f. In *Lehman*, a major point of difference between Justices Blackmun and Brennan was the former's view that the car cards were not a public forum, and the latter's conclusion that the city's own actions had turned the car cards into a public forum. PSC here, by this very regulation, is helping to prevent the bill inserts from becoming a public forum that would subject them to the strict scrutiny necessary for constitutional operation.

g. Shaker Heights' justifications for prohibiting political or public issue messages on its car cards were that the limitation on access to the advertising space would minimize (1) chances of abuse, (2) the appearance of favoritism, and (3) the risk of imposing upon a captive audience. All were accepted by Justice Blackmun as reasonable legislative objectives. Essentially similar justifications have been offered by PSC for keeping controversial issues of public policy out of utilities' bill inserts: (1) the risk of imposing on a captive audience, (2) the appearance of favoritism toward utilities' views on controversial issues, (3) the difficulties inherent in counteracting that appearance by permitting other points of view, and (4) the inevitable charges of improper conduct when PSC is placed in the position of an arbiter of fairness on controversial views, many of which may be far removed from matters of utility management and regulation.

In addition to the foregoing, however, PSC has two more justifications to add to its side of the balance. It seeks to protect the bill insert medium from over-use so that it may be preserved for important and useful information which PSC deems necessary for the consumer to use the utilities' services efficiently, economically and safely. In addition, PSC clearly seeks to avoid making a "public forum" out of the bill inserts, and thereby to steer clear of the issue that so sharply divided the Court in *Lehman*. As the Supreme Court found in *Police Department of Chicago v. Moseley* 408 US 92, 96, 92 SCt 2286,

2290 (1972), "once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." Since substantial constitutional and administrative consequences would flow from a determination that a particular medium of communication qualified as a "public forum", surely PSC may limit use of the billing mechanism so that it does not become such a forum. In this way PSC could avoid being enmeshed in a wide variety of issues and considerations that are not directly related either to the regulatory responsibilities of PSC or to the business of the utilities it regulates.

In short, on this issue, the Supreme Court in *Lehman* upheld against a first amendment challenge a governmental prohibition against "political and public issue advertising" on rapid transit vehicles. *A fortiori*, PSC's ban of "controversial issues of public policy" from the bill inserts of New York public utilities does not infringe the first amendment.

VI. Conclusion

On the promotional advertising issue, LILCO is entitled to judgment (a) declaring that the Statement of Policy on Advertising and Promotional Practices of Public Utilities, issued by defendant PSC on February 25, 1977, and all subsequent implementing orders of the PSC, to the extent that they prohibit plaintiff LILCO from truthful promotional advertising of electric space heating, violate the first amendment and are, therefore, unconstitutional, and (b) enjoining PSC from enforcing the prohibition.

On the bill insert issue, PSC and the intervenor defendants are entitled to judgment declaring that the portion of the order issued by PSC on February 25, 1977 that reads "all utilities subject to the jurisdiction of this Com-

mission shall discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy," does not infringe LILCO's rights under the first and fourteenth amendments to the United States Constitution.

The Clerk shall enter judgment accordingly.

SO ORDERED.

Dated: Westbury, New York
March 30, 1979.

/s/ GEORGE C. PRATT
GEORGE C. PRATT
U. S. District Judge

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

77 C 972

LONG ISLAND LIGHTING COMPANY,

Plaintiff,

—against—

THE NEW YORK STATE PUBLIC SERVICE COMMISSION; ALFRED E. KAHN, as Chairman of the New York State Public Service Commission; EDWARD BERLIN, as Deputy Chairman of the New York State Public Service Commission; and HAROLD A. JERRY, JR., EDWARD P. LARKIN, CARMEL CARRINGTON MARR, ANNE MEAD and CHARLES A. ZIELINSKI, Members of the New York State Public Service Commission,

Defendants,

SCIENTISTS' INSTITUTE FOR PUBLIC INFORMATION, NATURAL RESOURCES DEFENSE COUNCIL, INC., FRIENDS OF THE EARTH, CONSUMER ACTION NOW, JOAN MCCALL and SUSAN MAINWARING,

Intervenors.

JUDGMENT

A memorandum and order of Honorable George C. Pratt, United States District Judge, having been filed on March 30, 1979, declaring that the Statement of Policy on Advertising and Promotional Practices of Public Utilities issued by defendant THE NEW YORK STATE PUBLIC SERVICE COMMISSION (PSC) on February 25, 1977, and all

subsequent implementing orders of THE NEW YORK STATE PUBLIC SERVICE COMMISSION (PSC) to the extent that they prohibit plaintiff LONG ISLAND LIGHTING COMPANY (LILCO) from truthful promotional advertising of electrical space heating, violate the first amendment and are, therefore, unconstitutional, and, further, enjoining THE NEW YORK STATE PUBLIC SERVICE COMMISSION (PSC) from enforcing the prohibition;

And aforesaid memorandum and order, also declaring, on the bill insert issue, that the portion of the order issued by THE NEW YORK STATE PUBLIC SERVICE COMMISSION (PSC) on February 25, 1977, that reads "all utilities subject to the jurisdiction of this Commission shall discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy," does not infringe plaintiff LONG ISLAND LIGHTING COMPANY's (LILCO) rights under the first and fourteenth amendments to the United States Constitution, it is

ORDERED and ADJUDGED that plaintiff LONG ISLAND LIGHTING COMPANY (LILCO) have judgment declaring that the Statement of Policy on Advertising and Promotional Practices of Public Utilities, issued by defendant THE NEW YORK STATE PUBLIC SERVICE COMMISSION (PSC) on February 25, 1977, and all subsequent implementing orders of THE NEW YORK STATE PUBLIC SERVICE COMMISSION (PSC), to the extent that they prohibit plaintiff LONG ISLAND LIGHTING COMPANY (LILCO) from truthful promotional advertising of electric space heating, violate the first amendment, and are, therefore, unconstitutional, and that defendant THE NEW YORK STATE PUBLIC SERVICE COMMISSION (PSC) is enjoined from enforcing the prohibition;

IT IS FURTHER ORDERED and ADJUDGED that defendant THE NEW YORK STATE PUBLIC SERVICE COMMISSION (PSC)

and the intervenor defendants have judgment declaring that the portion of the order issued by THE NEW YORK STATE PUBLIC SERVICE COMMISSION (PSC) on February 25, 1977 that reads "all utilities subject to the jurisdiction of this Commission shall discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy," does not infringe plaintiff LONG ISLAND LIGHTING COMPANY's rights under the first and fourteenth amendments to the United States Constitution.

Dated: Westbury, New York
March 30, 1977

/s/ _____
Clerk

/s/ _____
Deputy Clerk

Approved:

/s/ GEORGE C. PRATT
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

77 Civ. 972

LONG ISLAND LIGHTING COMPANY,

Plaintiff,

—against—

THE NEW YORK STATE PUBLIC SERVICE COMMISSION *et al.*, *Defendants,*

MEMORANDUM AND APPEAL

PRATT, J:

Defendant New York State Public Service Commission (PSC) has moved, pursuant to FRCP 52(b), for the court to amend or make additional findings of fact in connection with the memorandum and order of March 30, 1979, declaring that PSC's ban on New York utilities' promotional advertising of electric space heating violates the first amendment. In addition, PSC seeks a stay of the court's order pending determination of the Rule 52(b) motion and appeal. Plaintiff Long Island Lighting Company (LILCO) opposes PSC's motion and the request for a stay.

As grounds for the Rule 52(b) motion, PSC argues that the court, in its March 30, 1979 opinion, "omitted or misconstrued certain material facts supporting state interests" that PSC had alleged. Specifically, PSC asserts (1) that the court, did not account for the constant availability of base load generating facilities during the winter

months, and their increased oil usage to generate more electricity; (2) that the court erred in stating that the PSC has not barred utilities from advertising the merits of gas fired space heating; (3) that the court omitted certain factual allegations by PSC concerning the effect of promotional advertising on electric rates; (4) that the court did not address the impact on consumers of improperly structured rates stemming from promotional advertising; and (5) that the court failed to discuss PSC's allegation that promotional advertising of electric space heating would stimulate a general rise in demand for electricity, thereby obstructing efforts by PSC and utilities to conserve energy. PSC also argues that the court was incorrect in concluding that the factual issues raised by PSC are relevant to direct regulation of electric heat, but not to promotional advertising of electric heat.

While PSC argues that the court "omitted or misconstrued" certain facts, the decision reveals that the court assumed, for purposes of the decision, that promotional advertising *would* increase the demand for electricity, *would* require use of more oil to generate the electricity, and *would* have an effect on electric rates. With respect to the claim that there would be an adverse effect on consumers because of rates which had been improperly structured by the PSC, the court assumed that it was within the power of the state, either through the PSC or the legislature, to restructure the rates should that be necessary.

With respect to utility advertising of gas fired heating, the court erred in stating that the PSC has not barred such advertising, but the court does not consider this fact to be dispositive of the underlying issue in this aspect of the case; whether PSC may do indirectly, through a ban on promotional advertising, that which it has thus far chosen not to do directly, that is, restrictions on usage of electricity. Thus, except for the gas advertising ban, each of the "omitted" facts that PSC asserts on this motion was considered by the court and either weighed in

evaluating PSC's interests, or deemed irrelevant or immaterial to a ban on advertising, as opposed to a restriction on use. The Supreme Court decisions relied upon in the March 30 decision make it clear that an otherwise entirely lawful commercial activity may not be regulated indirectly by prohibiting truthful advertising to consumers about that activity.

The factual issues referred to by PSC go to the merits of direct regulation of electric space heating, and, therefore, are not material to a decision on LILCO's first amendment rights in the promotional advertising of such an activity. PSC's motion pursuant to FRCP 52(b) is, therefore, denied, and PSC's request for a stay pending determination of the motion is denied as moot.

PSC seeks, in addition, a stay of the court's March 30, 1979 order pending appeal to the Second Circuit. Under FRCP 62(c), the district court may, in its discretion, stay the effect of an injunction during the pendence of an appeal. The ban of which LILCO complains and now has had invalidated was imposed in 1973. LILCO waited until 1977 to challenge that ban in this action. The questions presented are of significant public importance, and it does not appear that LILCO will suffer any significant injury if its promotion of electric heat is delayed another few months in addition to the five years it took for the issue to be submitted to this court for determination. Accordingly, the request for a stay pending appeal of that portion of the court's judgment which enjoined enforcement of the ban on promotional advertising of electric heat is granted on condition that PSC diligently prosecute the appeal.

Finally, in the court's memorandum and order of March 30, 1979, lines 15-16 on page 5 (Part II, C. State Court Proceedings) is hereby amended to read as follows: "Third Department affirmed on the promotional advertising issue, and reversed on the bill insert issue * * * ."

So Ordered.

/s/ George C. Pratt
George C. Pratt
United States District Judge

Dated: Westbury, New York
April 16, 1979

MOTION FILED
DEC 14 1979

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In the

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.,

Appellant,

V.

PUBLIC SERVICE COMMISSION OF
THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLEE

Pursuant to Rule 42 of the Rules of the Supreme Court, the New York State Consumer Protection Board (hereinafter referred to as CPB) and the National Association of State Utility Consumer Advocates (hereinafter referred to as NASUCA) respectfully move for leave to file the accompanying brief in this case as *amicus curiae.* While the attorney for the appellee has consented to the filing of a brief *amicus curiae* by the CPB and NASUCA, the attorney for the appellant, Consolidated Edison Company, has refused to consent.

The New York State Consumer Protection Board, as part of the Executive Department of the State of New York, is mandated to coordinate and perform a wide range of consumer protection functions for the consumers of the State of New York. The CPB has the power and duty, *inter alia,* to conduct investigations, research, studies and analyses of matters affecting the interests of consumers; to represent the interests of consumers of the state before federal, state, and

local administrative and regulatory agencies; to study the operation of consumer protection laws; and to cooperate with and assist consumers in class actions. N.Y. Exec. Law §553.

In addition to these statutory responsibilities, the CPB has the authority to initiate, intervene in, or participate in any proceedings before the Public Service Commission. N.Y. Exec. Law §553(2)(c). The CPB is also authorized to seek judicial review of any final decision of the Public Service Commission involving the establishment of rates, where the CPB was a formal party to the administrative proceeding. Session Laws of New York, ch. 120 (1978). Pursuant to this authority, the CPB has participated in over fifty cases over the last four years involving the establishment of policy or rates for regulated gas, electric and telephone utilities.

The CPB has also filed a brief as *amicus curiae* in two other cases before this Court. In both cases, this Court granted the CPB's motions for leave to file briefs as *amicus curiae* even though the opposing parties in both cases refused to consent to the filing of the briefs. *Judice v. Vail*, 97 S.Ct. 251 (1976) and *Flagg Brothers v. Brooks*, 98 S.Ct. 714 (1978).

The CPB actively participated in the administrative proceedings before the Public Service Commission where the order which is the subject of this case was issued. The order prohibited the use of bill inserts on controversial matters and barred the recovery in utility rates of the cost of specific types of advertising. The CPB filed written comments in September, 1976 supporting a restriction on utility advertising and filed a petition for rehearing on March 28, 1977 regarding those parts of the order the CPB objected to (Appellant's Brief, p. 5).

The National Association of State Utility Consumer Advocates is an association of independent state agencies responsible for representing utility consumer interests before state or federal regulatory agencies. The members of NASUCA actively participate in utility regulatory proceedings in their respective states by presenting technical witnesses, cross-examining utility witnesses, briefing legal and technical issues, and obtaining judicial review of adverse administrative

decisions where appropriate. NASUCA consists of state consumer advocates from twenty-two states, the District of Columbia, and Guam. The CPB is a member of NASUCA.

In this case, the CPB and NASUCA have an interest in ensuring that utility consumers are not forced to subsidize the dissemination of the controversial views of utility managements to a captive audience. In addition, as on-going participants in the regulatory process, the movants have a keen interest in preserving the bill insert mechanism for the communication of reliable and factual service-related information.

As experts in utility regulation, the CPB and NASUCA want to add to the legal arguments presented by the appellee, Public Service Commission of the State of New York (PSC), an analysis of the state's duty to protect ratepayers from overreaching by state-authorized monopolies. We submit that this governmental interest is central to the PSC's authority to bar the use of bill inserts by utilities to promote their controversial views on matters of public policy. Neither the brief filed in the New York Court of Appeals by the PSC nor the draft brief *amicus curiae* of the Natural Resources Defense Council, Inc. et al. discusses this argument in detail.

We, therefore, submit that the CPB and NASUCA have a significant interest in the case before this Court, as well as expertise in utility regulation which enables the movants to present a brief *amicus curiae* that will aid the Court in its deliberation.

Date: December 13, 1979

Respectfully submitted,

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SUMMARY OF ARGUMENT

The Public Service Commission of the State of New York (PSC or Commission) did not abridge the First Amendment rights of Consolidated Edison (Con Edison) by holding that utilities subject to the Commission's jurisdiction may not use the bill insert mechanism to communicate the utilities' views on controversial matters of public policy. The order of the Court of Appeals holding that no First Amendment rights were violated should be affirmed.

The Commission action is an appropriate exercise by the state of its governmental interest and duty to protect ratepayers to the maximum extent possible from the consequences of the state's grant of monopoly power to a private enterprise. Con Edison has an unquestioned right to express its views on controversial matters by using its own (stockholders') money and through the ordinary means available to all persons. However, it does not have the right to transform its statutory duty to inform ratepayers about service-related matters through the bill insert medium, which ratepayers are forced to support and receive, into a First Amendment forum.

The Commission acted properly in preventing the dissemination of controversial matters in the bill insert because the Constitution forbids entities with government-conferred power from forcing individuals to provide financial support for political positions with which they do not agree. The cost of producing and mailing the bill insert is borne by rate-payers and the use of the insert for dissemination of the utilities' views would amount to an unconstitutional forced subsidy of the utilities.

In addition, the Commission action was proper to protect captive ratepayers, who are as a practical matter compelled by the state monopoly franchise to deal with the utility assigned to their service area. Because this 'captive' status is the direct result of government franchise, the state has a special duty to protect the privacy rights of the ratepayers.

The Commission applied its ban on controversial matter evenhandedly. Recognizing that permitting utilities to express controversial views would have given rise to a requirement that persons with opposing views be given access to the bill insert,

the Commission ordered that neither utilities nor those with opposing views could use the bill insert for controversial issues. By taking this action, the Commission preserved the bill insert mechanism for the communication of service-related, neutral information.

ARGUMENT

I. THE STATE HAS A DUTY TO PROTECT RATEPAYERS FROM THE ABUSE BY UTILITIES OF THE BILL INSERT MECHANISM.

Con Edison is a utility operating under a state-authorized monopoly to sell electricity, gas and steam to virtually all of the residential, commercial and industrial customers within its service area. The utility claims a First Amendment right to disseminate its views on controversial matters of public policy through the use of bill inserts, a medium of communication which ratepayers are compelled to finance and receive. Specifically, Con Edison argues that its right of free speech was unconstitutionally abridged by an order of the New York Public Service Commission (Commission or PSC) prohibiting utilities subject to its jurisdiction from using bill inserts "as a mechanism for the dissemination of the utility's position on controversial matters of public policy." (J.S. App. 57a).

The right asserted by Con Edison to exercise its free speech through the bill inserts does not exist. In fact, the PSC order which is the subject of this challenge is an appropriate exercise by the state of its governmental interest and duty to protect ratepayers to the maximum extent possible from all of the consequences of the compulsion involved in the exceptional grant by the state of monopoly power to a private enterprise. As the Commission stated in its order denying petitions for rehearing:

> Utility bill inserts are not newspapers which, in principal, any person is free to publish and thereby make his opinions known to the public. *The privilege to disseminate utility bill inserts derives from the privilege of franchised monopoly, conferred by the government. It can, therefore, be regulated by the government to assure that it is exercised in the public interest.* (J.S. App. 67a; emphasis added).

Monopolies are generally against the public policy of the United States and the State of New York. N.Y. Gen. Bus. Law §340; Sherman Anti-Trust Act, 15 U.S.C. §§1,2, (1973). However, Con Edison and other utilities subject to the jurisdiction of the PSC are permitted to operate as monopolies because of a determination by the state that the public interest is served by generally protecting them from competition. 2 A. Kahn, The Economics of Regulation 113-171 (1971).

This exceptional grant of power to a private enterprise by the state carries with it a correlative duty on the part of the state to protect ratepayers from what could otherwise be excessive rates and other forms of overreaching by the monopoly enterprise.* The duty to protect ratepayers arises from the fact that ratepayers are forced to deal with the authorized utility in order to receive a necessity of life, or not receive it at all. *Slaughter House Cases* 83 U.S. 36 (1873); *Nebbia v. New York* 291 U.S. 502, 529, 531 (1933); *Rochester Gas and Electric Company v. Public Service Commission* 66 App. Div. 2d 509, 512, N.Y.S. 2d 754, 756, (1979); c.f. *Munn v. Illinois* 94 U.S. 113 (1876). Part of the compulsion of the ratepayers to deal with the authorized utility is, of course, the requirement that services received are paid for. Therefore, the entire bill payment system — meters, meter-reading, bill mailings

*The New York State Public Service Commission has the authority to supervise all gas and electric corporations; to prescribe uniform methods of accounts, records and books to be observed by gas and electric corporations; to require the filing of detailed annual reports; to enter in and inspect the property of gas and electric corporations; to examine their books, contracts, documents; and to fix the rates gas and electric corporations can charge. N.Y. Pub. Serv. Law §66. The PSC also has the responsibility of approving the use of the utility's revenues (N.Y. Pub. Serv. Law §107) and of approving the dissolution of a gas or electric corporation or a change in its Certificate of Incorporation (N.Y. Pub. Serv. Law §108). Furthermore, the legislation also gives the PSC "all powers necessary or proper to enable it to carry out the purposes of this chapter". N.Y. Pub. Serv. Law §4.

and bill inserts — is supported by ratepayers under Commission rules permitting recovery of necessary operating expenses. Uniform System of Accounts — Expense Accounts — Customer Account Expenses, 16 N.Y.C.R.R., Vol. A, §§901—906.

The PSC has determined that the bill insert is a convenient and efficient method of communicating important service-related information to utility customers. For example, every electric corporation must advise its customers of procedures available to register complaints regarding service or disputed bills. 16 NYCRR §143.9. Commission rules also require that most utilities "furnish to their customers a narrative description of the essential elements affecting them of each proposed major rate change, by bill inserts . . . " 16 NYCRR §136.80. In its February 27, 1977 Statement of Policy, the subject of this challenge, the Commission found that bill inserts were appropriate for,

> appeals for the conservation of gas or electricity; notification of emergency conditions and procedures; instructions in the proper use of the equipment which makes use of the utility's service; information about new rates, new billing practices, or new inspection or meter reading schedules; advice concerning hazards associated with the utility's service; reports on matters of interest to the public concerning the utility's service — such as service difficulties and progress in overcoming them, projections of new capacity additions, plans for new or improved means of providing service, and the like. (Policy Statement, J.S. App. 44a).

Each of the subjects listed by the Commission are neutral or non-controversial in the sense that they are related to the service provided by the utility. That is not to say that all ratepayers would necessarily agree with all of the information that would be contained in the inserts under the PSC's Statement of Policy. Some might not agree, for instance, about the need to conserve scarce resources and most would not welcome information about new rates. But the standard that emerges from the Commission's policy statement is

whether the information is useful to the recipient as a ratepayer and user of utility services.

In contrast, Con Edison is seeking to use the bill inserts to communicate with recipients not as ratepayers, but in their other capacities, particularly as citizens. For example, the review culminating in the contested order was initiated, in part, in response to a complaint against a Con Edison bill insert promoting nuclear power. The insert, entitled "Energy Independence is Still a Goal, and Nuclear Power is Needed To Win the Battle" (A. 34—37), advocated nuclear power, disparaged its critics and touted its safety. The utility has no constitutional right to transform its statutory duty to inform ratepayers about service-related matters into a First Amendment right to speak to citizens about such controversial issues of public policy determination.

Con Edison, of course, has an unquestioned right to express its controversial views to citizens. However, the facts of this case are not similar to *First National Bank of Boston v. Bellotti* 435 U.S. 765 (1978), which is relied upon so strongly by Con Edison. In that case, the Court found an unconstitutional abridgment of free speech when state law prohibited a corporation from using its own money to express by ordinary means its views on general political issues. The PSC order under challenge here in no way prevents a utility from expressing its political views in any forum available to other businesses or individuals. Rather, Con Edison's complaint is that the Commission failed to consecrate to Con Edison's use an additional ratepayer-subsidized medium of communication.

II. CON EDISON DOES NOT HAVE A FIRST AMENDMENT RIGHT TO A SUBSIDIZED FORUM IN WHICH TO DISSEMINATE ITS CONTROVERSIAL VIEWS.

Con Edison argues that "the sending out of the bill inserts will not cost the ratepayers one cent more than the rates they already pay . . . . The fact that the utilities may incidentally save money by the use of bill inserts, at no expense to the ratepayers, is not detrimental to the ratepayers or the public." (Appellant's Brief, p. 21). This formulation asks the wrong question and arrives at the wrong answer. As the Appellate Division of the Supreme Court of New York stated in its decision in this case,

> That the mailing would not cost the consumers anything is irrelevant since the issue is whether management's costs will be reduced through customer subsidy. In the battle of ideas, the utilities are not entitled to require the consumers to help defray their expenses. (J.S. App. 19a).

The Constitution forbids entities with government-conferred power from forcing individuals to provide financial support for political positions with which the individuals do not agree. *Abood v. Detroit Board of Education* 421 U.S. 1 (1976). In *Abood,* the Court held that a union, a state-designated exclusive bargaining agent, could be prevented under the First and Fourteenth Amendments from "spending a part of [the members'] required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." *Abood,* supra at 234. The instant case clearly parallels *Abood.* In both cases, money collected as a direct result of power conferred by government would have been used to promote the political views of the party collecting the money. And, in both cases, this misuse of the power conferred is prohibited by the Constitution.

III. CON EDISON DOES NOT HAVE A FIRST AMENDMENT RIGHT TO DISSEMINATE ITS CONTROVERSIAL VIEWS TO ITS CAPTIVE RATEPAYERS.

The Commission's Statement of Policy noted that the use of bill inserts to communicate a utility's position on controversial matters is "tantamount to taking advantage of a captive audience, since the consumer cannot avoid receiving the literature with the the utility's message." (J.S. App. 43a) The New York Court of Appeals, in upholding the Commission's order said, "Consumers of utility services, like many others in captive situations, have no choice concerning receipt of a periodic statement from the power company." (J.S. App. 10a). Implicit in these statements is the recognition that the customer's 'capativity' is the direct result of the state having compelled the customer to deal with a given utility. It is in this context of state-enforced 'captivity' that the ratepayer's right to privacy should be examined.

Con Edison does not dispute that its views on controversial matters such as nuclear power might be offensive to customers, but dismisses this as an "insignificant infringement" because the customer "is not forced to read [the] message and may discard it as quickly as he or she wishes." (Appellant's Brief, pp. 18, 19) This ignores the vital statutory function that the billing mechanism is intended to serve. A customer, first of all, cannot discard the communication unopened, as in the case of junk mail; he or she must open it in order to pay the bill. Second, a customer can only acquire the important information on safety, tariff changes, complaint procedures, etc. required by statute, order, and regulation if the customer reads some portion of each article to ascertain its subject matter.

Contrary to Con Ed's apparent assumption, the First Amendment does not guarantee the right to communicate with unwilling recipients. "[T]he right of every person 'to be let alone' must be placed in the scales with the right of others to communicate." *Rowan v. Post Office Department* 397 U.S. 728, 736 (1970). This is especially true when the offensive material is sent through the mails, violating the privacy of the

home: "We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even 'good' ideas on an unwilling recipient. . . . The asserted right of a mailer, we repeat, stops at the outer boundary of every person's domain." *Rowan,* supra at 738.

Con Edison would distinguish *Rowan* on the ground that it stands for the proposition that "the decision as to whether a given communication is to be received at home is a judgment for each person to make, not one for the State to impose . . ." (Appellant's Brief, p. 19). But in the instant case, the customer cannot avoid the communication without forfeiting his right to receive important service-related information.

Nor, says Con Edison, does *Rowan* involve speech which is "at the core of the First Amendment." (Appellant's Brief, p. 19). yet individuals are not protected only from shocking speech in their homes. In *Lehman v. City of Shaker Heights* 418 U.S. 298 (1974), a restriction on the same type of speech involved in the instant case (political speech) was upheld where it was directed at a captive audience, riders of publicly-owned transit. *Lehman* recognized the importance of protecting a captive audience from unwanted expressions, even outside the home, where the forum used is primarily dedicated to another, incompatible use.

The opinion of Mr. Justice Blackmun, announcing the judgment of the Court in *Lehman* said, "No First Amendment forum is here to be found" and noted that the city had limited access to transit advertising in order to minimize the following: 1) the chances of abuse, 2) the appearance of favoritism and 3) the risk of imposing upon a captive audience. *Lehman,* supra at 304. Similarly, prohibiting controversial matter in bill inserts minimizes the following: 1) the abuse of mixing opinion with factual service-related matter, 2) the impression that the utility's views (or the views of an opposing party) are favored by the Commission and 3) the risk of imposing upon captive ratepayers.

The contested Commission order can also find support in the *Lehman* dissent written by Mr. Justice Brennan. Justice

Brennan said that "the Court must assess the importance of the primary use to which the public property or facility is committed and the extent to which that use will be disrupted if access for free expression is permitted." *Lehman*, supra at 312. Here, the Commission has never sanctioned the use of bill inserts for controversial issues, and in fact limited its use to service-related matters. That 'primary use' would clearly be disrupted to the extent that the insertion of controversial material either displaces factual information or tends to confuse fact with opinion.

Con Ed attempts to distinguish *Lehman* on the ground that the 'forum' involved there was government-owned property, whereas the billing mechanism is Con Edison's "own property." (Appellant's Brief, p. 16). This contention is refuted by statute and by definitive decision of New York's highest court. *Consolidated Edison v. Public Service Commission* 47 NY 2d 94 (1979). The New York Public Service Law gives the Commission plenary supervisory powers over all property, real and personal ". . . used or to be used . . . in connection with or to facilitate the . . . sale or furnishing of electricity for light, heat or power." N.Y. Pub. Serv. Law §66(1), 2(12). (The Commission is given equal power over property used to provide gas service. N.Y. Pub. Serv. Law §§66(1) and 2(10).) In addition, the Commission has the power to regulate the format and informational requirements of bill inserts. N.Y.S. Pub. Serv. Law §66(12-a). The Court of Appeals has ruled that this power extends to all contents of the billing envelope. Thus, the distinction of private versus government-owned property is inapposite. The pertinent inquiry is whether, given the Commission's regulatory authority over bill inserts, this particular order violates Con Edison's right of free speech. It does not violate Con Edison's right of expression because, as in *Lehman*, "No First Amendment forum is here to be found." *Lehman*, supra at 304.

IV. THE PUBLIC SERVICE COMMISSION EXERCISED REASONABLE DISCRETION IN LIMITING THE BILL INSERT MECHANISM TO THE COMMUNICATION OF SERVICE-RELATED INFORMATION.

Had the Commission allowed utilities to disseminate their controversial views in the bill inserts, there would have unquestionably arisen a requirement to allow other persons access in a manner that is not arbitrary, capricious or invidious. *Lehman*, supra at 303. If the state allows one party access to a medium or facility it controls, it must allow access to those with opposing viewpoints. ". . . [G]overnment must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prevent others from assembling or speaking on the basis of what they intend to say." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 96 (1972); see also, *East Meadow Community Concerts Association v. Board of Education* 18 NY2d 129 (1966).

Nevertheless, Con Edison construes the Commission's action as applying only to utilities: "The ban applies only to utilities and to no one else." (Appellant's Brief, p. 16). In fact, the Commission held that no one — neither utilities nor ratepayers — could use the bill insert for the expression of controversial matters. In its Order denying petition for rehearing, the Commission expressly stated that consideration was given to allowing access to all, but that option was rejected:

> . . . [W]e were all convinced ultimately that [access to all] would be difficult to administer fairly, and would tend to lessen undesirably, the number of bill inserts dealing directly with such useful and uncontroversial information as consumer conservation measures. (J.S. App. 66a, 67a).

Clearly, the Commission's policy was not adopted to penalize utilities, but as a reasonable measure to preserve the bill insert as an informational device and to assure simplicity and clarity in the communication of service-related information.

V. CONCLUSION

For the foregoing reasons, the judgment of the New York Court of Appeals should be affirmed.

Respectfully submitted,

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BRIEF OF APPELLANT IN OPPOSITION TO MOTION OF NEW YORK STATE CONSUMER PROTECTION BOARD FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

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This brief is submitted in opposition to the motion of the New York State Consumer Protection Board ("CPB") for leave to file a brief *amicus curiae*. We believe it is our duty to object to the granting of this motion because under New York law the CPB has no statutory authority to file an *amicus* brief in this appeal.

The scope of the CPB's statutory authority was reviewed in *Pooler* v. *Public Service Commission,* 58 A.D.2d 940 (3d Dept. 1977), *aff'd,* 43 N.Y.2d 750 (1977).* It was there held that while the CPB has statutory authority to represent consumers in proceedings before the Public

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* The CPB's organic act is reprinted in the appendix to this brief.

Service Commission, its authority terminates with the issuance of the final order of the Public Service Commission. Thus, the CPB has no statutory authority to participate in judicial proceedings to review decisions of the Public Service Commission.

Subsequent to the New York Court of Appeals' decision in *Pooler,* the New York Legislature conferred limited authority on the CPB to participate in judicial appeals involving utility rates. 1978 N.Y. Laws, ch. 120. The issue on this appeal is whether the Public Service Commission's bill insert ban is valid. Con Edison's rates are not at issue on this appeal.

For the foregoing reason, the motion of the New York State Consumer Protection Board for leave to file a brief *amicus curiae* should be denied.

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APPENDIX

Article 20 of the New York Executive Law (McKinney 1972 and Supp. 1972 to 1979), relating to the State Consumer Protection Board, provides:

§ 550. State consumer protection board

There is hereby created in the executive department a state consumer protection board, hereafter referred to in this article as the board, which shall consist of the chairman of the public service commission, the superintendents of banking and insurance, the commissioners of agriculture and markets, environmental conservation, commerce and health, the secretary of state and the executive director of the board. Members of the board other than the executive director shall receive no compensation for their services as members, but shall be allowed their actual and necessary expenses incurred in the performance of their duties. The attorney general shall coordinate the enforcement powers of his office with the activities of the board.

§ 551. Executive director

The executive director shall be the chairman of the board. He shall be appointed by the governor with the advice and consent of the senate and shall hold office during the pleasure of the governor and shall receive an annual salary to be fixed by the governor within the amount available therefor by appropriation. He shall also receive his reasonable expenses in connection with the performance of his duties within the amount available therefor by appropriation.

§ 552. Organization of the board

The executive director may establish, consolidate, reorganize or abolish any organizational units under the board as he determines to be necessary for efficient operation. He shall assign appropriate functions to any such unit and may appoint such staff, agents and consultants as he may deem necessary and prescribe their duties and fix their compensation within the appropriation provided by law.

§ 553. Powers and duties of the board and the executive director

1. The board shall have the power and duty to:

a. coordinate the activities of all state agencies performing consumer protection functions; and

b. prepare each year a report to the governor and to the legislature of its activities.

2. The executive director shall have the power and duty to:

a. receive complaints of consumers and refer them to the appropriate federal, state or local agency authorized by law for appropriate action on such complaints;

b. advise and make recommendations to the governor on matters affecting the consumers of the state and promote and encourage the protection of the legitimate interests of consumers within the state; and

c. on behalf of the board, initiate, intervene in, or participate in any proceedings before the public service commission, to the extent authorized by sections twenty-four-a, seventy-one, eighty-four or ninety-six of the public service law or any other applicable provision of law, where

he deems such initiation, intervention or participation to be necessary or appropriate.

3. The executive director when so directed by the board shall have the power and duty to:

a. conduct investigations, research, studies and analyses of matters affecting the interests of consumers;

b. cooperate with and assist the attorney general in the carrying out of his legal enforcement responsibilities for the protection of consumers;

c. cooperate with and assist consumers in class actions in proper cases;

d. represent the interests of consumers of the state before federal, state and local administrative and regulatory agencies;

e. study the operation of consumer protection laws and recommend to the governor new laws and amendments of laws for consumer protection;

f. conduct product research and testing and, where appropriate, contract with private agencies and firms for the performance of such services;

g. initiate and encourage consumer education programs;

h. cooperate with and assist local governments in the development of consumer protection activities;

i. establish advisory councils to assist in policy formulation on specific consumer problems; and

j. undertake activities to encourage business and industry to maintain high standards of honesty, fair business practices, and public responsibility in the production, promotion and sale of consumer goods and services.

§ 553. Note

Appeal from Public Service Commission Rates. Section 1 of L.1978, c. 120, eff. May 9, 1978, provided:

"Notwithstanding any provision of law to the contrary, the consumer protection board shall be entitled, as a matter of right, through its counsel, to take a judicial appeal pursuant to article seventy-eight of the civil practice law and rules on any final decision of the public service commission involving the establishment of rates, where the board was a formal party to a proceeding before such commission in which such rates were reviewed or determined. The board shall also be entitled, as a matter of right, through its counsel, to appeal any refusal of the commission to review, determine or modify a rate, or to initiate a formal proceeding for such purpose."

Supreme Court, U. S.
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In the

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No. 79-134

Consolidated Edison Company of New York, Inc.,

Appellant,

v.

Public Service Commission of the State of New York,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

REPLY BRIEF TO APPELLANT'S BRIEF IN OPPOSITION TO MOTION OF NEW YORK STATE CONSUMER PROTECTION BOARD FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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Appellant opposes the New York State Consumer Protection Board's (CPB) motion for leave to file a brief *amicus curiae* on the grounds the CPB " . . . has no statutory authority to file an *amicus* brief in this appeal." Appellant's Brief in Opposition, p. 1. The appellant relies on the decision in *Pooler v. Public Service Commission* 58 A.D. 2d 940 (3d Dept. 1977), *aff'd*, 43 N.Y. 2d 750 (1977), for the proposition that the CPB does not have the authority to participate in judicial proceedings to review decisions of the Public Service Commission (PSC). However, the *Pooler* case only concerned the capacity of the CPB to commence a review proceeding; it did not prevent the CPB from participating in judicial cases in other ways, such as by filing briefs *amicus curiae*. *Pooler*, supra at 940.

Appellant also recognizes that the Board now has the authority to initiate judicial review of Public Service Commission decisions involving utility rates. 1978 N.Y. laws, Ch. 120. Appellant submits, however, that this appeal does not

involve rates. Contrary to appellant's contention, the PSC order that is the subject of this appeal makes it clear that it involves utility rates. The PSC found that " . . . it is basically unfair to assess against ratepayers the cost of advertisements urging the adoption of positions with which they may disagree. Therefore, we will no longer sanction the use of sums provided by ratepayers to advance one side of a public controversy." Appellant's J.S. App. 42a - 43a; also see appellant's J.S. App. 67a.

Even assuming, *arguendo*, that the CPB does not have the power to initiate this appeal, appellant's objection must be rejected. This Court previously has permitted a government agency to be heard as a friend of the Court even though no law existed expressly authorizing the agency to participate as a formal party. *The Employers' Liability Cases* 207 U.S. 463 (1908); see also *United States v. Massachusetts Maritime Academy* 76 F.R.D. 595 (U.S. D.C. Mass., 1977); 4 Am Jur 2d 110.

Therefore, the CPB respectfully requests that its motion to file an amicus brief in this case be granted.

Respectfully submitted,

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